



Department
of Energy &
Climate Change

Private Rented Sector Minimum Energy Efficiency Standard Regulations (Non-Domestic) (England and Wales)

Consultation on implementation of the Energy Act 2011 provision for energy efficiency regulation of the non-domestic private rented sector

July 2014



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The consultation and Impact Assessment can be found on DECC's website:

<https://www.gov.uk/government/consultations/private-rented-sector-energy-efficiency-regulations-non-domestic>

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Joint Ministerial Foreword



Over the coming decade we need to achieve a step change improvement in the energy efficiency of our non-domestic property. The energy we use for heating and powering our non-domestic buildings is responsible for around 12% of the UK's CO2 emissions. To achieve the UK's legislative targets, CO2 emissions from all buildings must be 'close to zero' by 2050. This implies in the longer term, UK buildings will need to reach energy efficiency standards of close to an A Energy Performance Certificate (EPC) rating. Today, 18% of non-domestic properties are in the very lowest EPC bands – those rated F and G. In addition to meeting our climate change targets, improving the energy efficiency of our buildings can help us smooth seasonal peaks in demand for energy, increasing our energy security, and reducing energy costs.

The split incentive, whereby the landlord pays to make the investment in improving a property's energy efficiency, but the tenant reaps the benefits, has traditionally been a barrier to investment in energy efficiency in rented non-domestic property. The "pay-as-you-save" principle underpinning Green Deal finance creates a win-win opportunity for both landlords and tenants; the electricity bill payer, normally the tenant, meets the cost of improvements through savings on their electricity bill whilst they are in occupation and benefiting from the improvements. Landlords gain improvements to their property without compromising their income. There is clearly great potential for investment through the Green Deal mechanism and we expect finance providers to come forward to meet demand. However, we need to take additional steps to make sure that improvements are made to the very worst performing properties.

This consultation, summarised in two documents – one for each of the domestic and non-domestic sectors - set out detailed proposals for energy efficiency regulations using powers within the Energy Act 2011. The non-domestic minimum energy efficiency regulations for England and Wales will mean that by 1 April 2018, all eligible properties will have to be improved to a minimum energy efficiency standard before being let to tenants, except where certain exemptions apply. To ensure that there are no upfront costs, landlords will not be obliged to undertake improvements where there is not finance to pay for them.

This consultation follows engagement with stakeholders including leading landlord, tenant, environmental and property professional representative organisations. We are grateful for the input we have received ahead of this publication and hope to gather further views and evidence from a wide range of people and organisations that may have an interest in this important

policy. We look forward to hearing your views on all the proposals in this consultation and would like to thank you in advance for providing a response.

A handwritten signature in black ink, appearing to read "Edward Davey". The signature is written in a cursive style with a horizontal line underneath.

Rt Hon Edward Davey MP

Secretary of State for Energy and Climate Change

A handwritten signature in black ink, appearing to read "Amber Rudd". The signature is written in a cursive style.

Amber Rudd MP

Parliamentary Under Secretary of State for Energy and Climate Change

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General information

Purpose of this consultation:

This consultation seeks views on the proposed regulations under the Energy Act 2011 to set a minimum energy efficiency standard for properties in the non-domestic private rented sector in England and Wales.

Issued: 22 July 2014

Respond by: 2 September 2014

Enquiries to:

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Consultation reference: URN 14D/229 – Private Rented Sector Minimum Energy Efficiency Standard Regulations (Non-Domestic)

Territorial extent:

England and Wales

How to respond:

Your response will be most useful if it is framed in direct response to the questions posed, though further comments and evidence are also welcome.

Please respond by email to nondomprsconsultation@decc.gsi.gov.uk

Additional copies:

You may make copies of this document without seeking permission. An electronic version can be found at <https://www.gov.uk/government/consultations/private-rented-sector-energy-efficiency-regulations-non-domestic>

Other versions of the document in Braille, large print or audio-cassette are available on request. This includes a Welsh version. Please contact us under the above details to request alternative versions.

Confidentiality and data protection:

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information legislation

(primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004).

If you want information that you provide to be treated as confidential please say so clearly in writing when you send your response to the consultation. It would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded by us as a confidentiality request.

We will summarise all responses and place this summary on our website at https://www.gov.uk/government/publications?departments%5B%5D=department-of-energy-climate-change&publication_filter_option=consultations . This summary will include a list of names or organisations that responded but not people's personal names, addresses or other contact details.

Quality assurance:

This consultation has been carried out in accordance with the Government's Code of Practice on consultation, which can be found here:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255180/Consultation-Principles-Oct-2013.pdf

If you have any complaints about the consultation process (as opposed to comments about the issues which are the subject of the consultation) please address them to:

DECC Consultation Co-ordinator
3 Whitehall Place
London SW1A 2AW
Email: consultation.coordinator@decc.gsi.gov.uk

Executive summary

This consultation seeks views on the proposed regulations under the Energy Act 2011 to set a minimum energy efficiency standard for properties in the non-domestic private rented sector in England and Wales.

Introduction

1. The Energy Act 2011 places a duty on the Secretary of State to bring into force regulations to improve the energy efficiency of buildings in the domestic and non-domestic private rented sector in England and Wales¹. Domestic and non-domestic private rented sector Minimum Energy Efficiency Standard Regulations must be in force by 1 April 2018, and will require all eligible properties in the sector to be improved to a specified minimum standard. Domestic private rented sector Tenant's Energy Efficiency Improvement Regulations must be in force by 1 April 2016 and will empower tenants in the sector to request consent for energy efficiency measures that may not unreasonably be refused by the landlord.
2. This consultation document sets out the Government's proposals relating to the implementation of regulations in the non-domestic sector. For the Government's proposals for implementation of the domestic sector provisions, please see our domestic sector consultation document, available here: <https://www.gov.uk/government/consultations/private-rented-sector-energy-efficiency-regulations-domestic> .
3. The Minimum Energy Efficiency Standard Regulations are referred to as "minimum standard regulations" in this document.

Background

4. The non-domestic private rented sector minimum standard regulations are intended to tackle the very least energy efficient properties – those rated F or G on their Energy Performance Certificate (EPC). These properties waste energy – an unnecessary cost on

¹ The Energy Act 2011 provides Scottish Ministers with powers (but not a duty) to implement domestic and non-domestic private rented sector energy efficiency regulations, however to date Scottish Ministers have opted to use Section 63 of the Climate Change (Scotland) Act 2009. Under Section 63, 'Energy Performance of Non-Domestic Buildings', there is a duty on Scottish Ministers to regulate for: assessment of the energy performance of non-domestic buildings and emissions produced; and owners of such buildings to improve the energy performance and reduce emissions. Consultations on policy development are available online: <http://www.scotland.gov.uk/Topics/Built-Environment/Building/Building-standards/publications/pubconsult/consultepprops> and <http://www.scotland.gov.uk/Publications/2013/03/5662> .

business and the wider economy, and a contributing factor to the country's greenhouse gas emissions.

5. Increasing the energy efficiency of our property stock can help us smooth seasonal peaks in energy demand, and thereby increase our energy security. Increased demand for energy efficiency measures is also likely to support growth and jobs within the green construction industry and the wider supply chain for energy efficiency measures. Greater competition within these markets may also spur innovation, lowering the end costs of installing measures to households, and help sustain jobs.
6. The energy we use for heating and powering our non-domestic buildings is responsible for around 12% of the UK's emissions². Around 60% of today's non-domestic buildings will still exist in 2050, representing around 40-45% of the total floor space³. Whilst standards are in place to tackle the performance of new buildings, improving the performance of the existing stock through energy efficiency upgrades will be essential in tackling energy used across the non-domestic stock.
7. Information contained in the EPC register shows that there is a clear opportunity to drive improvements in the energy efficiency of buildings in the non-domestic sector. However as the Department's 2012 Energy Efficiency Strategy⁴ set out, the potential for making energy efficiency improvements is not fully being realised due to market failures and other barriers.
8. A key barrier to improvements in rented property is the split incentive; that the costs of energy efficiency improvements are borne by landlords, while the benefits (lower energy bills) accrue to current or future tenants. Whilst the Green Deal will help unlock potential for improvements in rented property by tackling the split incentive, it alone will not be sufficient to engender the level of take up that the Government would like to see, and a regulatory impetus to act, well sign-posted in advance, is needed.
9. The non-domestic private rented sector is already covered to some degree by other policies for example, the Carbon Reduction Commitment (CRC) and Climate Change Agreements (CCAs). However, these policies do not cover the entire non-domestic building stock⁵. There are currently no policies incentivising improvements in energy efficiency in the non-domestic private rented stock which may result in no action amongst some of the most energy inefficient properties.

² DECC 2011, The Carbon Plan: Delivering our low carbon future:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/47613/3702-the-carbon-plan-delivering-our-low-carbon-future.pdf

³ Carbon Trust 2010, Building the Future Today:

http://www.carbontrust.com/media/77252/ctc765_building_the_future_today.pdf

⁴ DECC 2012, The Energy Efficiency Strategy: The Energy Efficiency Opportunity in the UK:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/65602/6927-energy-efficiency-strategy--the-energy-efficiency.pdf

⁵ For example, DECC estimates that 37-40% (or 57-67TWh) of business (non-SME) electricity use is not covered by the CRC or CCA and up to 9% (or 30 TWh) of non-SME other energy use is not covered by the CRC, CCA or EUETS

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211471/130521_Energy_Audits_IA_v28_clean.pdf

10. Recognition of the need for an impetus to act on energy efficiency, especially for the very worst performing buildings, was at the heart of the 2011 Energy Act's provisions for the regulations.
11. In order to ensure that any regulations do not impose disproportionate burdens on business, the Government has committed to ensuring that landlords do not face upfront costs for required improvement measures. The regulations will not affect over 80% of non-domestic properties that are rated A-E on their EPC, and will not apply to owner occupied non-domestic property.
12. In February 2013 the Department set up a cross sector working group where leading sector stakeholders provided views and ideas as to how the regulations could best be implemented. Following this engagement with the sector, this consultation document seeks views on the Government's proposals.

Policy proposal summary

13. The regulations will apply to leased non-domestic buildings within scope of the Energy Performance of Buildings (England and Wales) Regulations 2012. Any building not required to obtain an EPC as determined in the EPC regulations, such as a building that is about to be demolished, will also not have to comply with the minimum standard regulations.
14. Cost safeguard provisions will mean that where a property falls below an E EPC rating, the landlord would only be required to make those improvements which could be made at no upfront cost, for example through a Green Deal finance arrangement⁶. Whilst the Green Deal Finance Company is currently not offering Green Deal finance on non-domestic properties, it continues to keep this under review. Our expectation is that other companies may also be interested in offering finance in the non-domestic sector as well.
15. To assist those landlords who may prefer not to use the Green Deal finance process, the Government is consulting on whether landlords could be permitted to demonstrate compliance by undertaking all improvements that pay for themselves in energy bill savings within a prescribed period.
16. The regulations would not require landlords to carry out improvements where necessary third party consent is denied. Therefore where a landlord is denied consent to such improvements, or Green Deal finance chosen to pay for them, such works would not be required.
17. The Government is also seeking views on whether an exemption from undertaking improvements to reach the minimum standard should be provided where an independent property valuation demonstrates that required improvement works would result in a net material reduction in a property's value. The Government expects it to be highly unlikely that energy efficiency improvements could have this effect but is nevertheless seeking views on the merits of including this provision.
18. Where a property has not reached an E EPC rating due for any of the above reasons, such exemptions from meeting the standard would not last in perpetuity, but would expire

⁶ Where landlords carry out building work to existing properties – for example, conversions, renovations, replacement windows and boilers etc - this work, however financed, should meet the minimum energy efficiency requirements set out in national Building Regulations irrespective of what impact this may have upon the EPC rating of the property.

after a reasonable period of time. The Government proposes that this would be five years, or earlier where a tenant vacates the property and the reason for the exemption was the tenant's refusal to consent. When the exemption expires, the landlord would need to seek to comply with the standard or again demonstrate an exemption in order to let the property.

19. Those non-domestic buildings within scope of the EPC regulations newly let from 1 April 2018 onwards will be required to comply with the regulations. From 1 April 2023 a regulatory "backstop" will apply whereby all properties within scope would be required to meet the standard, including existing lets, or demonstrate an exemption. As the regulations are to be designed to respect any valid third party consent obligations that a landlord might have, where the backstop applies to existing leases, a sitting tenant's refusal to consent to improvements or Green Deal finance, an exemption would be provided.
20. The Government is also seeking views as to the merits of committing to a forward trajectory whereby the regulatory standard is increased over time, providing longer term certainty over what standards apply when, helping businesses make better decisions as to what improvements to undertake and when.
21. Trading Standards Officers (TSOs) will be the enforcement agents for the non-domestic regulations, and the Government is seeking views on its proposed approach to enforcement, penalties and appeals.
22. Having gathered views on the proposals the Government plans to issue its response and lay the regulations by the start of 2015 in order to provide certainty and clarity to the market as to what the regulations will require, giving businesses time to plan and implement their response ahead of the regulations coming into force.

Catalogue of consultation questions

Consultation Question

1. Do you agree with the proposed scope of buildings and leases that should be covered by the minimum standard regulations? If not, what building or lease types should be included or excluded?

Consultation Question

2. Do you agree that where a property falls below an E EPC rating, the landlord would only be required to make those improvements which could be made at no net or upfront cost, for example through a Green Deal finance arrangement? For those properties that do not meet an E EPC rating, do you have any suggestions for how the process could be streamlined?

Consultation Question

3. Should the Government allow landlords the option of demonstrating compliance by installing those measures which fall within a maximum payback period, and if so do you have any evidence on an appropriate payback period? Do you have any views on how the process of identifying improvement payback periods should operate?

Consultation Question

4. Do you agree with the proposed method for demonstrating an exemption where works would result in a material net decrease in a property's value? What would be the most appropriate way to set the threshold?

Consultation Question

5. Do you have any evidence that shows the scale of the costs and benefits (including non-financial costs and benefits) associated with improving the energy efficiency of a property, for example time taken to undertake cost effective improvements?

Consultation Question

6. Does the proposed consents exemption strike the right balance between recognising existing landlord obligations, whilst also ensuring that the allowance is not used as a loophole to avoid undertaking improvements? Do you have any views on how beneficial owner consents should be taken into account?

Consultation Question

7.	Do you think the regulations should have a phased introduction applying only to new leases to new tenants from 1 April 2018? Do you agree the regulations should also have a backstop, applying to all leases from 1 April 2023? If not, what alternatives do you suggest?
Consultation Question	
8.	Should the regulations apply upon lease renewals or extensions where a valid EPC exists for the property?
Consultation Question	
9.	Do you agree that an exemption for properties below an E rating should last for five years, or where the exemption was due to a tenant's refusal to consent, when that tenant leaves, if before five years?
Consultation Question	
10.	Do you agree that the Government should set a trajectory of standards beyond 2018, and if so, how and when should this be done?
Consultation Question	
11.	Do you consider where a property has a valid exemption for letting below an E EPC rating that certification of compliance would be helpful? If so should this be voluntary or mandatory? Do you have any other comments regarding compliance and how Trading Standard Officers (TSOs) could be supported with enforcement, for example identifying landlords?
Consultation Question	
12.	Do you agree that the penalty for non-compliance should be linked to a percentage of a property's rateable value? If so, what percentage should this be? If not, what alternatives do you suggest? Should the Government set a minimum and maximum fine level, and if so at what levels should these be set?
Consultation Question	
13.	Do you consider that the First-tier Tribunal is the appropriate body to hear and determine appeals about decisions regarding non-compliance with the minimum standard regulations? Do you consider that the General Regulatory Chamber Rules of the First-tier Tribunal will suit the handling of these appeals? If not, what tribunal could be used?
Consultation Question	
14.	Do you have any comments not raised under any of the above questions?
Consultation Question	

15.

Do you have any comments or evidence regarding the consultation impact assessment that could inform the final impact assessment, for example the average length of void periods or length of tenant stay in different sectors?

Introduction to the Non-Domestic Minimum Standard Regulations

Overcoming barriers

23. The Carbon Plan⁷ states that to achieve the UK's legislative targets, emissions from all buildings must be 'close to zero' by 2050. This implies in the longer term, UK buildings will need to reach energy efficiency standards of close to an A EPC rating.
24. For the economy as a whole, improving the energy efficiency of buildings has a positive effect. This is particularly true for non-domestic buildings. The Carbon Trust has estimated that improving building fabric can save at least £4bn for the UK economy by 2020, increase security of energy supply and provide UK workers with better, more productive buildings⁸.
25. The energy we use for heating and powering our non-domestic buildings is responsible for around 12% of the UK's emissions⁹. Around 60% of today's non-domestic buildings will still exist in 2050, representing around 40-45% of the total floor space.¹⁰ Whilst standards are in place to tackle the performance of new buildings, improving the performance of the existing stock through energy efficiency upgrades will be essential in tackling energy used across the non-domestic stock.
26. In September 2012, the median Energy Performance Asset Rating Band for non-domestic properties is Band "D". F and G rated properties make up 18% of the total building stock.
27. The distribution of EPC ratings across the non-domestic sector can be found in the following table:

⁷ DECC 2011, The Carbon Plan: Delivering our low carbon future:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/47613/3702-the-carbon-plan-delivering-our-low-carbon-future.pdf

⁸ Carbon Trust 2010, Building the Future Today:
http://www.carbontrust.com/media/77252/ctc765_building_the_future_today.pdf

⁹ DECC 2011, The Carbon Plan: Delivering our low carbon future:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/47613/3702-the-carbon-plan-delivering-our-low-carbon-future.pdf

¹⁰ Carbon Trust 2010, Building the Future Today:
http://www.carbontrust.com/media/77252/ctc765_building_the_future_today.pdf

Table 1: EPC Non-domestic Properties (Hereditaments¹¹), as at September 2013 (England and Wales)

Energy Performance Asset Rating Band	Number of non-domestic hereditaments	%
A	2,428	1%
B	31,336	7%
C	114,142	27%
D	124,285	30%
E	70,210	17%
F	35,637	8%
G	42,804	10%
All non-domestic properties	420,804	100%

28. The rented property makes up approximately 66% of total commercial buildings (by value)¹². The Government does not collect centrally the EPC ratings that apply just to the private rented sector so the Government has assumed that the private rented sector has a similar distribution to the overall building stock.

29. Information contained in the EPC register shows that there is a clear opportunity to drive improvements in the energy efficiency of buildings in the non-domestic sector. However as our 2012 Energy Efficiency Strategy¹³ set out, the potential for making energy efficiency improvements is not fully being realised due to market failures and other barriers. Research from the Carbon Trust Advisory Services¹⁴ found that major businesses are wasting at least £1.6bn annually because they continue to undervalue the financial returns gained from investing in energy efficiency; finance directors typically estimate the average internal rate of return from energy efficiency projects to be less than 20%, when in fact it is closer to 48%.

30. Green Deal finance has particular relevance to the private rented sector as it helps overcome the split incentive; that the costs of energy efficiency improvements are borne by landlords, while the benefits (lower energy bills) accrue to current or future tenants. It does this by placing the cost of improvements, spread out over time, with the energy bill

¹¹ A hereditament is a unit of property space to which business rates are applied

¹² BPF/IPD 2013, Property Data Report:

http://www.bpf.org.uk/en/files/reita_files/property_data/BPF_Property_Data_booklet_2013_spreads_web.pdf

¹³ DECC 2012, The Energy Efficiency Strategy: The Energy Efficiency Opportunity in the UK:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/65602/6927-energy-efficiency-strategy--the-energy-efficiency.pdf

¹⁴ Carbon Trust Advisory Services 2010, The Business of Energy Efficiency:

<http://www.carbontrust.com/resources/reports/advice/the-business-of-energy-efficiency>

payer whilst they are occupying the property and benefiting from the improvements. Bill payers are protected by the Golden Rule which says that repayments must not be any larger than the expected energy bill savings. Whilst the Green Deal Finance Company is currently not offering Green Deal finance on non-domestic properties, it continues to keep this under review. Our expectation is that other companies may also be interested to offer finance in the non-domestic sector as well.

31. Whilst the Green Deal will help unlock potential for improvement, it alone will not be sufficient to engender the level of take up of improvements that the Government wants to see, and a regulatory impetus to act, well sign-posted in advance, is needed. Recognition of the need for an impetus to act on energy efficiency, especially for the very worst performing buildings, was at the heart of the 2011 Energy Act's provisions for the private rented sector regulations.
32. In developing the detailed proposals for the energy efficiency regulations, the Government has sought to work with the grain of the sector; encouraging the take up of energy efficiency improvements at the most opportune points in a lease cycle, and allowing for improvements to be negotiated with prospective tenants. We have also committed to ensuring that the regulations do not entail upfront or net costs to landlords.
33. In order to help develop the consultation proposals, in February 2013 the Department convened two advisory groups, one for the domestic private rented sector, and one for the non-domestic private rented sector. The groups comprised leading landlord, tenant, environmental and property professional organisations, and provided expert feedback and views on how the requirements could apply. The Department would like to thank all those who contributed to discussions through these groups. Minutes from the meetings and a report providing a summary of the group's discussions and recommendations are available online¹⁵¹⁶.
34. By engaging with the sector and setting out our consultation proposals early, well ahead of a 2018 implementation, the Department has sought to provide sufficient scope for industry involvement and feedback to ensure that the regulations are a success. By setting out our intent, and laying the regulations well ahead of 2018, we aim to provide certainty as to the detail of what the regulations will require. This will allow businesses to plan and implement their response, and it will allow the supply chain the time to respond to increases in demand. Moreover, by giving the sector time to prepare, we expect that there will be less need for enforcement action when the regulations do come into effect.

Links to the Energy Performance of Buildings Directive and Energy Efficiency Directive

35. The Energy Performance of Buildings Directive came into effect progressively from 2007. Its implementation remains an important part of the strategy to tackle climate change. The current requirements are set out in the Energy Performance of Buildings (England and Wales) Regulations 2012, which came into effect on 9 January 2013, although they have been amended since, and the Building Regulations 2010. The principle underlying the Directive and the regulations is to make energy efficiency of buildings transparent by

¹⁵ <https://www.gov.uk/government/policy-advisory-groups/133>

¹⁶ <https://www.gov.uk/government/publications/non-domestic-private-rented-sector-regulations-working-group-report-report-to-government>

using an EPC, to show the energy rating of a building, when sold or rented out and recommendations on how to improve energy efficiency. The minimum standard regulations build upon this framework to help ensure that action is taken to improve the energy efficiency of the worst performing private rented properties, as determined by a property's EPC rating.

36. The 5 June 2014 marked the transposition deadline for the EU Energy Efficiency Directive. The Directive represents a major step forward for energy efficiency, contributing to the establishment of a common framework of measures to promote energy efficiency across different sectors of the economy throughout the EU.
37. In accordance with Article 4 of the Energy Efficiency Directive, the UK Government published a Building Renovation Strategy in April 2014. The UK has a rich tradition in building retrofit and has often led the way in Europe. Successive governments have used building regulations to drive energy efficiency improvements and energy savings since 1972, and we were one of the first Member States to introduce a supplier obligation. Though many of the easier to treat building measures have already been installed across the UK, particularly in the domestic sector, significant potential remains. The Government estimates over 80 TWh of outstanding cost-effective energy efficiency potential remains untapped in the UK's building stock. The Government is committed to furthering our understanding of the building stock and the options for realising the outstanding energy efficiency potential. Increased energy efficiency can drive growth and support jobs in the economy, drive cost-effective energy savings, and improve health outcomes. The refurbishment sector has a key role to play in achieving these and the introduction of minimum standard regulations in the private rented sector. Building refurbishment is a key part of the UK's growing energy efficiency market, which is already worth more than £18 billion annually and employs more than 100,000 people.
38. Article 6 and Annex III(f) of the Energy Efficiency Directive requires Member States to ensure their central governments purchase only buildings with high energy efficiency, where this is consistent with cost-effectiveness, economic feasibility, wider sustainability, technical suitability and sufficient competition. Member States are required to purchase, or make new rental agreements for only buildings that comply at least with minimum energy performance requirements set out in the Energy Performance of Buildings Directive, with compliance measured by a building's Energy Performance Certificate (EPC) rating. The UK has transposed Article 6 of the Directive through administrative directions, which set out the energy efficiency standards that government departments must consider when purchasing or letting buildings.
39. In June 2014 the Government launched the Energy Savings Opportunity Scheme (ESOS). The scheme is being implemented as part of the UK's transposition of the EU Energy Efficiency Directive and requires every large company in the UK to undertake regular energy efficiency audits – with the first ones to be completed by December 2015. ESOS could help businesses to save an additional £280 million in 2016 and reduce total UK energy consumption by 3 TWh a year, improving energy security and cutting carbon emissions in the process. Businesses will not be required to implement the findings of the audits, but it will give them access to trusted, targeted information to help inform their future energy efficiency investment decisions. Where appropriate, businesses will be able to use existing, or future Green Deal Assessments, as part of their compliance with the scheme.

Consultation proposals

Introduction

40. The following sections set out the Government's proposals for using the powers contained in the Energy Act 2011 to make regulations relating to privately rented non-domestic property. The sections set out our proposals as to: the non-domestic properties and leases in scope and out of scope; the improvements that the regulations will require including cost and consent exemptions; when such improvements are required including the dates that the regulations come into force and the point in a lease cycle the regulations bite; and how the regulations will be enforced, including provisions for penalties and appeals.
41. The Government would welcome responses to the specific questions posed, but would also welcome wider comments and evidence regarding issues that the proposals raise. In particular the Government would welcome views as to how the requirements under the regulations can at every stage be clear and simple, especially for small to micro businesses, and enforcement agents.

Building types in scope

42. A non-domestic property is in scope of the minimum standard regulations if it is:
- a) situated in England and Wales,
 - b) let under a tenancy, and
 - c) not a dwelling.
43. The scope of buildings within the above criteria that may be expected to meet the minimum standard regulations will mirror the existing Energy Performance of Buildings (England and Wales) Regulations 2012. So if a property is within scope to obtain an EPC, it would also be in scope of the minimum standard regulations. Consequently if a building is outside the scope of having to obtain an EPC, it would automatically be excluded from the minimum standard regulations. For example an EPC is not required for buildings due to be demolished and therefore the Government proposes to mirror these exemptions in the minimum standard regulations. This will mean that regardless as to whether the property has an EPC (for example it may have been acquired voluntarily or due to previous versions of the EPC requirements), the property would not be expected to meet the obligations set out in the minimum standard regulations, although the Government will be encouraging voluntary improvements where appropriate through our wider energy efficiency policies.

Lease types in scope

44. The minimum standard regulations will also mirror the trigger point in the EPC regulations for providing an EPC upon let (the minimum standard regulations do not apply to sales),

so where a type of letting triggers a requirement to obtain an EPC, it will also trigger a requirement to meet the minimum standard regulations.

45. An EPC obligation applies regardless of the length of a lease. However, the Government would welcome views on whether there is merit in further refining the type of lease that triggers a minimum standard regulations obligation, so that only leases agreed for a period in excess of six months and less than 99 years would be within scope of the minimum standard regulations, and therefore leases that are shorter or longer than this would not need to meet any obligations under the minimum standard regulations.
46. This is proposed on the basis of feedback received from stakeholders that the regulations should avoid capturing short flexible leases, often used by SME occupiers, and properties that are to be redeveloped. Stakeholders recommended also that the regulations should consider avoiding very long leases that are more akin to a sale than to private let and where the landlord has very little direct interest or involvement with the property for long periods of time. To avoid the de-minimis six month threshold being used to avoid the regulations, by short leases being granted on a repeat basis, the exclusion would cease to apply where such a lease is granted to the same tenant more than twice.
47. Where a tenant sublets their property or part of their property, the tenant has duties as a landlord under the EPC regulations to provide an EPC to prospective tenants. Similarly, the Government proposes that a tenant would need to meet their obligations under the minimum standard regulations as a landlord for the space that they sub-let. There are likely to be constraints on what a tenant subletting their space can achieve without superior landlord consent with regards to energy performance as the scope for building upgrades permitted may be limited. Such constraints would be recognised within the consents framework outlined in the “Restrictions on undertaking improvements” section below.
48. The purpose of providing an EPC during the renting process is to enable potential tenants to consider the energy performance of a building as part of their investment. Not all transactions will be considered to be a let to which the duties apply. Currently EPCs are not required for lease renewals or extensions, and the advantages and disadvantages of taking a different approach for the minimum standard regulations are explored in the ‘Lease renewals’ section later in this consultation document.
49. Please see the Communities and Local Government (CLG) guidance¹⁷ for full details as to what criteria must be taken into account in considering whether an EPC may be required for a building.

Consultation Question

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| 1. | Do you agree with the proposed scope of buildings and leases that should be covered by the minimum standard regulations? If not, what building or lease types should be included or excluded? |
|-----------|--|

¹⁷ DCLG 2012, Guide to energy performance certificates for the construction, sale and let of non-dwellings: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/50268/A_guide_to_energy_performance_certificates_for_the_construction_sale_and_let_of_non-dwellings.pdf

The required improvements

The minimum standard

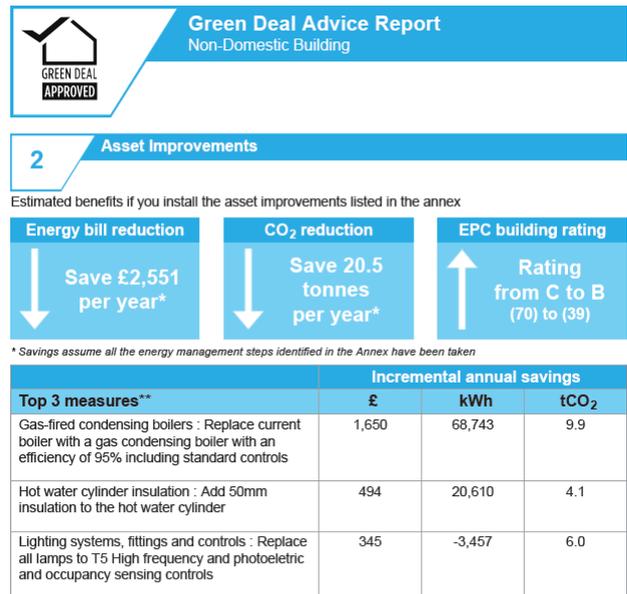
50. The Government proposes to set the minimum energy efficiency standard at an E EPC rating, in line with the domestic sector. This will mean that any non-domestic property within scope of the regulations with an E or above rating will be in compliance with the regulations, and properties below this standard must install those measures required to reach an E EPC rating. The timing as to when the requirement to undertake the improvements applies is explored in the ‘When and how the regulations apply’ chapter below.

51. However the Government proposes that landlords would be permitted to let a property below the minimum E standard where the property has undertaken all those improvements that would meet the Golden Rule, taking into account any finance offered to cover the upfront cost of installation. The Golden Rule is that repayments for improvements, including any interest charges, must be the same or less than the expected energy bill savings (in the first year). By permitting landlords to let property below an E rating where they have installed those measures that meet the Golden Rule, the Government ensures that landlords can meet their obligations under the regulations without incurring upfront costs for the improvement measures, and without having to make unreasonably expensive investments.

52. Feedback from some stakeholders suggested that an alternative route to demonstrate that all reasonable measures had been undertaken to a property below an E rating, would be welcome. The Government is therefore seeking views on the merits of offering landlords the option of obtaining an exemption from reaching the E rating where they undertake those measures that have a reasonable payback period. The Government is seeking evidence as to whether to offer this option, and what a reasonable payback period should be.

53. Where a landlord has undertaken those measures possible within the Golden Rule, or potentially within a set payback period (should the Government offer this option), the landlord will be permitted to let the property, even if the property remains below an E rating. However this exemption would not last in perpetuity, and would expire after a reasonable period (this is explored in the ‘Duration of exemptions for properties below an

Figure 1: Example recommended asset improvements section from a GDAR



** The full list of measures has been identified in the annex

Assumptions and baselines

The estimated savings above have been calculated using the standard Green Deal assessment methodology. They account for the way the building is currently used and make an assumption that all the recommended management and operational measures in the Annex on page 9 have been taken. Key examples of the sort of management measures you could adopt are described in Section 3, with a full list provided in the Annex. The asset measures listed above are those you have discussed with your Green Deal Advisor.

Cost savings are based upon fuel prices (provided by you and/or your advisor) and are indicative rather than guaranteed running cost savings.

Estimated baseline energy consumption (after energy management improvements)

213929 kWh per year in consumption of [Natural Gas] at 2.4p per kWh.
19574 kWh per year in consumption of [Grid Supplied Electricity] at 7.0p per kWh.

E rating' section below). Upon expiry the landlord would need to again attempt to meet the required E standard, or demonstrate an exemption.

Golden Rule investment requirement

54. A landlord of an F or G EPC rated property seeking to identify the improvements required within the Golden Rule would first obtain a non-domestic Green Deal Assessment. The Green Deal Advice Report (GDAR) would set out a recommended package of improvements for the property including their expected energy bill savings (see previous page for an example of a recommended asset improvements section of a GDAR). The annual bill savings estimate establishes the size of annual repayments for the installation of the improvements that would meet the Golden Rule.
55. To establish whether the recommended measures can be paid for within this repayment cap, the landlord would seek quotes for the purchase and installation of improvements recommended on the GDAR, including finance required to cover the upfront cost of installation. Where improvements meet the Golden Rule, such measures would need to be installed. Please see chart below for illustration of a Golden Rule compliant package.



56. A landlord would not be compelled to take out any finance offered in a quote to undertake the works; a landlord may use the information to simply identify a Golden Rule compliant package of measures, and then pay for the improvements through any means they choose.
57. Where the landlord has undertaken all improvements within the Golden Rule but the property remains below an E, the landlord would need to retain evidence of the Green Deal Assessment, quotes in writing for improvements including finance charges, and the post improvement works EPC. This would demonstrate for the purposes of the regulations that the landlord had undertaken all measures possible within the Golden Rule.
58. Where no measures at all pass the Golden Rule a landlord would need to obtain another two Green Deal quotes. If none of these offered a package within the Golden Rule the landlord would be permitted to let the property but would need to retain evidence of the assessment and their quotes. Should either the second or third quote offer a package within the Golden Rule, that package would be required to be undertaken. As usual, the

landlord would not necessarily have to use the supplier that offered the quote, but would need to undertake the measures identified.

Consultation Question

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| 2. | Do you agree that where a property falls below an E EPC rating, the landlord would only be required to make those improvements which could be made at no net or upfront cost, for example through a Green Deal finance arrangement? For those properties that do not meet an E EPC rating, do you have any suggestions for how the process could be streamlined? |
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Alternative investment requirement

59. Some stakeholders have suggested that an alternative route to demonstrate reasonable levels of investment in energy efficiency improvements have been made to a property below an E rating would be welcome. This is because a landlord may decide that they have no intention of using Green Deal finance, or even using a Green Deal Provider. Such landlords may have preferred suppliers, existing contracts with suppliers, and/or may have access to capital or other preferred sources of financing.
60. In order that such landlords may demonstrate that they had undertaken reasonable steps in improving property rated below an E, to an equivalent level as would have been the case through the Golden Rule, the Government suggests that where all improvements that fall within a maximum payback period had been undertaken, the property could receive an exemption. The payback period would be the time required to recoup the cost of purchasing and installing improvements from the expected energy bill savings. If a landlord had undertaken such measures that met the payback period, they would be permitted to let the property below an E rating. In the same way as the Green Deal, reasonable making good costs would be taken into account within this assessment, and as for measures financed via any other routes, measures that a landlord cannot obtain consent for would not need to be installed (please see the 'Restrictions on undertaking improvements' chapter of this consultation document).
61. The Government welcomes views on whether to offer this route in addition to the Golden Rule option, and if so what a reasonable payback period should be. There are a number of situations where the cost effectiveness of improvements are assessed on the basis of a payback period. For example Building Regulations require consequential energy efficiency improvements where certain works are undertaken to buildings with a total useable floor area of over 1,000 m². Consequential improvements are required that are technically, functionally and economically feasible. Measures that achieve a simple payback of not exceeding 15 years will usually be considered to be economically feasible. The EPC Recommendations Report categorises improvements into indicative payback periods; those that are short (less than three years), medium (three to seven) and long (more than seven years). Should an alternative payback option be offered, it may be helpful to base the test around existing measures. However a key consideration will be ensuring that the payback period delivers at least a comparable level of energy saving as the Golden Rule finance route.
62. In order to identify those measures within the prescribed payback, a landlord could be required to obtain a Green Deal Assessment which contains expected energy savings for recommended improvements for the particular property. Landlords could then obtain quotes for measures and install those which are expected to pay for themselves in energy

bill savings within the set period, retaining evidence of the previous EPC, Green Deal Assessment, quotes for the improvements and the post works EPC.

63. Similar to the Golden Rule process, where no improvements can be installed which meet the set payback period, a landlord would have to obtain at least another two quotes. If none of these offered a package falling within the payback period, the landlord would retain evidence of these quotes. Should either the second or third quote provide a package within the payback period, the package would be required to be undertaken.

Consultation Question

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| 3. | Should the Government allow landlords the option of demonstrating compliance by installing those measures which fall within a maximum payback period, and if so do you have any evidence on an appropriate payback period? Do you have any views on how the process of identifying improvement payback periods should operate? |
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Potential devaluation exemption

64. In addition to a proposed safeguard regarding upfront costs to landlords through the Golden Rule cap on investment, the Government is considering the merits of allowing landlords an exemption where required energy efficiency improvements would result in a devaluation of their property. It is the Government's view that it would be highly unlikely that energy efficiency improvements could have this effect.
65. However, as a precaution, the Government proposes to include provisions within the regulations for an exemption where improvement works required are deemed to result in a net material decrease in a property's capital or rental value. To ensure that the assessment is carried out in an independent manner, and to avoid any risk of the allowance being used by those wish to circumvent the regulations, the assessment would need to be carried out by a valuer accredited by the Royal Institution of Chartered Surveyors (RICS). The assessment would:
- a) be based on the impact of the measures, and would not take into account Green Deal finance. This is because through the Golden Rule the repayments should be the same or lower than the expected energy bill savings, and therefore are not a material consideration;
 - b) balance any potential negative impact against any positive impact (for example the benefits of an improved EPC rating and more efficient property balanced against any reduction of internal floor space due to internal wall insulation);
 - c) any overall decrease in property value would need to be material to avoid exemptions being given where the net impact is only marginal, and to reduce the risk that the exemption is used to deliberately avoid the regulations.
66. In determining the meaning of a "material" decrease, one approach would be to leave it to valuers to make the judgement based on the particular circumstances of the property and local market, and for the Government to work with the RICS in setting out the considerations. Another approach would be to set the decrease as a percentage of the property's capital or rental value, for example a net material decrease of 5% or 10%.

However given the wide variation on property values across the country and between properties, the threshold would vary considerably.

67. Where a landlord was concerned that the improvements might negatively impact the value of their property, they would need to take details of the package of improvements for a valuer to undertake a before and after assessment. Where the valuer's assessment agrees with the landlord that the works would result in a net material devaluation of the property, the landlord would need to retain a copy of the RICS valuer's report, a copy of a Green Deal Assessment, the quotes for work showing the package of works and the latest version of the EPC.
68. Property valuation is not an exact science and therefore it may not be possible to disentangle which improvement would be the main cause of the de-valuation, however where it is possible to identify specific measures that would lead to devaluation, only those measures would not have to be installed.

Consultation Question

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| 4. | Do you agree with the Government's proposed method for demonstrating an exemption where works would result in a material net decrease in a property's value? If so, what would be the most appropriate way to set the threshold? |
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Ancillary costs

69. The Government recognises that whilst Green Deal finance may offer a route to overcome upfront costs for improvements, there could be costs in facilitating the works. Such ancillary costs in many cases will be small. For a minority of larger more complex buildings requiring more invasive works there could be additional building surveying, consultancy and project management costs which may not be covered in any finance arrangement. However the Government expects that the possible benefits of an improved property would outweigh such possible costs, but would welcome evidence on this issue.

Consultation Question

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| 5. | Do you have any evidence that shows the scale of the costs and benefits (including non-financial costs and benefits) associated with improving the energy efficiency of a property, for example time taken to undertake cost effective improvements? |
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Restrictions on undertaking improvements

Consent exemptions

70. In some cases a package of improvement works meeting the Golden Rule, a prescribed payback period or an E rating will need consents from a third party. Where improvement works have been prevented by lack of such consent, through no fault of the landlord, it would not be right to prevent the landlord from letting the property. The Government therefore proposes to provide an exemption where a landlord has been denied consent to undertake works, allowing them to let the property below an E EPC rating. Only those measures that were denied consent would not have to be installed; those improvements within a package that do not require consent or had consent provided would still need to be undertaken by the landlord.

71. Whether consent is required for improvements will depend on factors such as the nature of the measures, the wording of any contract, planning policy, or lease. The Government does not intend to set out in legislation who a landlord must seek consent from as this will vary considerably depending on individual circumstances. Therefore where a landlord considers that consent is required, it will be for the landlord to demonstrate and seek such consent.
72. Third parties from whom the landlord may need to seek consent, depending on the specific circumstances, may include:
- a) A planning authority where one or more improvements require planning permission
 - b) A lender where permission is required for changes to the property or the use of Green Deal finance
 - c) A freeholder or higher landlord where permission is required for the improvements
 - d) A tenant should the regulations apply where there is a sitting tenant and any improvements or Green Deal finance require tenant consent
73. Where consent is denied for measures the landlord must retain evidence (in writing) that:
- a) such consent was needed for the improvement(s) (for example their lease where the need to obtain consent from a freeholder is stipulated)
 - b) a request for consent was made (for example a letter to their freeholder)
 - c) confirmation that consent was refused (for example a letter from the freeholder denying consent)
74. Where no response is received from a third party that is required to provide consent, evidence of a landlord making best endeavours to obtain consent would be needed. The Government could provide guidance as to what might be considered evidence of best endeavours.
75. Where legal and beneficial ownership of a property is split, the legal owner will often have the responsibility of sanctioning requests from tenants to assign or sub-let, and to carry out alterations to their property. The legal owner will be aware of what the scope of their authority is in this regard. Some stakeholders have suggested that there could be complexities where the consent of a beneficial owner or owners is required in order for improvements to be installed. The Government wants to avoid such consents posing as a barrier to improvements required by the regulations being undertaken and is investigating how such consents ought to be treated and would welcome views on this issue.

Conditional consent

76. In some cases consent may be provided to the landlord, but with conditions. In this case, where the conditions are unreasonable, the landlord would not be expected to proceed. Given the range of situations where conditions may be attached to consents it is not possible to set out in legislation what would be deemed reasonable, and what would not. However the Government may need to set the broad parameters; for instance if a condition reduces a landlord's ability to let the building, or if it involves unreasonable costs. It would still however be for the enforcement body (Trading Standards Officers) to

decide on a case by case basis, and ultimately a court should a landlord appeal enforcement activity (please see section on enforcement below).

77. The Government recognises that there is a tension between ensuring that the regulations do not require a landlord to carry out work where required third party consent is not given, or is given with unreasonable conditions, and ensuring that such allowances do not create complexity and therefore challenges in ensuring compliance. One option to reduce the complexity of consents allowances would be the development of guidance for local authorities, landlords and tenants as to typical third party consent scenarios and the standard of evidence that would be expected to be retained.

Consultation Question

6.	Does the proposed consents exemption strike the right balance between recognising existing landlord obligations, whilst also ensuring that the allowance is not used as a loophole to avoid undertaking improvements? Will the proposed approach cause problems where legal and beneficial ownership is split and if so how these might be overcome?
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When and how the regulations apply

Commencement dates

78. The minimum standard regulations must be brought into effect by 1 April 2018, but there are a number of ways in which the Government could implement the energy efficiency regulations. For all building and lease types within scope of the regulations, the regulations could apply in the following ways:

A soft introduction – application of the regulations to new tenancies from 1 April 2018

79. With a soft introduction the requirement not to let a property below an E would apply only to leases granted to new tenants on or after 1 April 2018. This approach would have the benefit of capitalising on the natural point in which the parties enter negotiations. However a soft start would risk very long leases being outside of scope of the regulations for an unreasonably long period, reducing the impact of the regulations in delivering energy efficiency improvements. It may also send the wrong signal to the market – i.e. that it may be beneficial to delay and extend leases to avoid having to comply.

A hard introduction – application of the regulations to all leases from 1 April 2018

80. With a hard introduction the regulations would apply to all leased non-domestic properties from 1 April 2018, regardless as to whether the property is occupied on that date. However due to the consents exemptions outlined early in the 'Restrictions on making improvements' section, any tenants in occupation with a right to refuse works or Green Deal finance charges added to their energy bill, would be able to refuse the works, providing the landlord with an exemption.

81. The benefit of a hard introduction is that it provides clarity for all concerned that improvements must be made by 1 April 2018. It may also make it easier to undertake enforcement action as any property leased below standard would need to demonstrate an E rating or an exemption, and enforcement agents would not need to consider when the

property was let. However landlords and tenants would not ordinarily be set up and resourced to manage mid-lease negotiations and this may act as a disproportionate burden. Furthermore, in requiring all leases to demonstrate compliance immediately there may be a risk of sudden high demand when the regulations come into effect, straining the supply chain of Green Deal assessors, installers, providers and legal advisors, and potentially raising costs unnecessarily.

82. The relevant sections of the Energy Act 2011 only apply where the property has an EPC. Therefore where a hard start applies, properties without an EPC (for example because they have been let continuously to the same tenant since before the EPC regulations came into effect in April 2008), would not be caught by the regulations. Some stakeholders have suggested that this risks putting those landlords who may have voluntarily obtained an EPC at a disadvantage. However in obtaining an EPC early such landlords would be in a much stronger position to assess and plan improvements to their property before the regulations apply. Furthermore it would be difficult to establish an exemption for properties that had voluntarily obtained an EPC as the enforcement body would have to establish whether the property had or hadn't been required to obtain an EPC in the past.

A phased introduction - a soft start with a hard “backstop”

83. The Government's preferred option is a phased introduction, whereby the regulations apply to new leases to new tenants from 1 April 2018, but with a hard “backstop” at a later date applying the requirements to all leases. This would allow the sector, the supply chain and the enforcement agents, to gear up before the regulations apply to all leases, and it would ensure that very long leases do not remain outside the regulations. This would send a strong message to the market that there is no advantage to delay.

84. The Government proposes that 1 April 2023 would be an appropriate time to apply the backstop, providing 5 years, which is around the time taken for the average commercial property lease to expire. This would help to ensure that many properties will have been improved before the backstop applies. It also provides sufficient time for landlords and tenants to negotiate and agree any improvements before the regulatory obligation kicks in.

Consultation Question

7.	Do you think the regulations should have a phased introduction applying only to new leases to new tenants from 1 April 2018? Do you agree the regulations should also have a backstop, applying to all leases from 1 April 2023? If not, what alternatives do you suggest?
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Lease renewals

85. Currently lease renewals and extensions do not trigger an EPC requirement. However extending the application point for minimum standard regulations to lease renewals and extensions would arguably make sense, even though it could only apply to properties that had an EPC, as it is at these points in a lease cycle that both landlord and tenant are in negotiations, providing an opportune time to raise matters regarding energy efficiency improvements. Furthermore, should the Government opt for a soft start, more lettings would be brought within scope. Where a landlord has an obligation to renew a lease to an occupying tenant on the same terms, and where tenant consent is required to do the

improvements or allocate any Green Deal charges to their energy bill, if such consent is denied, the landlord would as usual have an exemption.

Consultation Question

8.	Should the regulations apply upon lease renewals or extensions where a valid EPC exists for the property?
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Duration of exemptions for properties below an E rating

86. Where a property has not been able to reach an E rating, but has installed those measures that could have been financed within the Golden Rule or potentially with a prescribed payback period, the property's exemption from having to achieve the E rating does not last in perpetuity. Similarly where consent has been denied for improvement works to achieve an E, the exemption does not last in perpetuity. A landlord would need to demonstrate the exemption still applies, or meet the minimum E standard at a later date. This is because improvement costs may have come down, new technologies may become available, planning rules may change, and freeholders and other third parties may change their view on proposed works.
87. The Government proposes that exemptions from reaching the minimum E standard would last for five years. Upon expiry of an exemption the landlord would need to either meet the required E rating, or demonstrate an exemption applies again.
88. However where an exemption relates to a sitting tenant's consent not being given for improvements, if the tenant moves out before the five year period has elapsed, the exemption would expire at the point the tenant moves out of the property, even though this would be before five years. An earlier expiry in this situation is sensible because the reason for the improvements not being undertaken – a sitting tenant's refusal – would no longer apply when the tenant has left the property.
89. Expiry of exemptions after a reasonable period – suggested as five years - ensures that a property below standard with an exemption does not remain below standard for long periods of time. Furthermore expiry of exemptions would engender an impetus to reach the standard in the first place. Allowing a reasonable period before a landlord must reattempt to meet the standard also ensures there is a realistic chance that circumstances, such as the cost of improvements, may have changed and improvements can be undertaken.

Consultation Question

9.	Do you agree that an exemption for properties below an E rating should last for five years, or where the exemption was due to a tenant's refusal to consent, when that tenant leaves, if before five years?
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Timing of works

90. Assuming the regulations introduce the Government's preferred phased manner of a soft start with a backstop, during the initial "soft" phase, any required works could be agreed before the tenant takes occupation.

91. Whilst it is always the ultimate duty of the landlord to ensure and demonstrate compliance, a landlord may wish to require prospective tenants meet certain obligations to ensure that the landlord is in compliance with the regulations. This could take the form of:
- a) restrictions in the lease on the ability of a tenant to remove property elements that may reduce the property's EPC rating to below the minimum level permitted by the regulations, or
 - b) agreement on the part of the tenant to undertake certain works. This could mean for example that when the tenant undertakes its fit-out works it also undertakes certain measures to ensure that the property's EPC rating meets the minimum standard at the point in which the lease is completed. Where either the landlord or the tenant is to carry out required works to a building before a lease is concluded, the parties often enter into an agreement to bind both parties to complete the transaction. The works are then carried out and, after they are completed, the lease is granted.
92. Should the tenant break any obligations agreed to with their landlord, risking landlord non-compliance with the regulations, it would be for the landlord to seek to enforce any provisions or seek recompense in the event of a penalty being imposed.
93. Where the regulations apply to new leases (a soft start), the landlord would not need a tenant's consent to improvements or Green Deal finance as these would need to be in place before the tenant takes the lease, or provisions must be included within the lease to ensure that the property achieves the standard before occupation. If the landlord chooses to use Green Deal finance, tenant agreement to pay these costs could form part of the terms of the lease.
94. Where a hard start or a backstop applies, meaning all leases/tenancies must comply, landlords would need to reach an E rating before the hard start or backstop comes into effect. If a landlord is unable to reach an E rating due to one of the exemptions set out earlier in this consultation document, they will need to retain evidence of this. For example should the regulations be introduced in our preferred manner of a soft start in 2018, followed by a backstop 2023, where a landlord undertakes all improvements possible within the Green Deal's Golden Rule but failed to reach an E rating in January 2020, they would need to retain evidence of this to prove that they had a valid exemption when the backstop applies. As exemptions last five years however, in this situation, the exemption would only apply until January 2025.

Trajectory

95. Given the UK's need to reduce energy consumption from buildings and the value of regulatory certainty, a number of stakeholders have suggested there may be merit in setting out a forward trajectory of standards beyond 2018. By providing guidance on the likely trajectory, Government can ensure that the sector is making an appropriate contribution to the UK's legally binding carbon targets. Setting out a trajectory would also help businesses put in place the most cost-effective compliance strategies and the supply chain plan ahead and ensure capacity to meet expected demand.
96. When exploring this issue with stakeholders, there was no consensus reached on whether the Government should set out a trajectory beyond 2018 early, but they did

agree to a set of principles that ought to be used when assessing when and how a forward trajectory could apply, these are as follows:

- a) Be linked to Government's wider energy and carbon saving objectives
- b) Take into account any changes that could affect EPC calculations
- c) Harmonise with other energy efficiency policies to avoid conflicting requirements
- d) Provide sufficient warning of tightening of standards for industry and the supply chain to prepare
- e) Be clear and easily understood by the whole industry, including smaller owners and occupiers.

97. Instead of setting out the required standard at a date beyond 2018 now there may be merit in establishing a formal process for reviewing the detail as to when and how this would best be done. The review could be undertaken by a cross Government-industry working group, similar to the Green Construction Board. This would send a message to the market encouraging voluntary improvements in anticipation of future standards.

Consultation Question

10.	Do you agree that the Government should set a trajectory of standards beyond 2018, and if so, what should this be, and how and when should this be done?
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Enforcement, penalties and appeals

Trading Standards led enforcement

98. The Energy Act 2011 states that local weights and measures authorities i.e. Trading Standards Officers (TSOs) will be the enforcement body for the regulations. It will be for TSOs to determine whether and when a civil penalty should be imposed, and the value of the penalty.
99. Whilst the regulations could in some cases entail a number of steps – in taking into account consent rights and funding considerations – the Government is committed to ensuring that the process of assessing exemptions and enforcing the regulations is as straight forward as possible, for the benefit of landlords, tenants and enforcement agents.
100. A key challenge with enforcing the minimum standard regulations will be distinguishing between compliant F and G rated properties, i.e. those that have a valid and evidenced exemption from reaching an E, and F and G rated properties which are rented out in breach of the regulations. Another challenge is in identifying those properties that are let – and the point in which they are let – from owner occupied properties. The Government is exploring ways in which Government data could be used better to assist TSOs direct their enforcement action, for example improved use of and open access to EPC data. We are also looking at the type of information that is displayed EPCs (for example page 5 which sets out details of a Green Deal Finance Plan).

Intermediaries

101. Professional advisors such as lettings agents, surveyors and lawyers could play a role in alerting landlords and tenants as to what may be required for a property to comply with the regulations. The Government will work with the representative bodies for such advisors to consider how best information and guidance can be disseminated to ensure that landlords and tenants are made aware of the regulations and how they apply. However the regulations would not place any specific legal obligations on such third parties to police compliance with the regulations.

Enforcement

102. The Government intends to set out the detail of the requirements in the regulations, including the precise form of evidence for exemptions, and when it must be received. In addition the Government will develop guidance for local authorities and the sector to help ensure the requirements are understood and easy to follow.
103. The Government is committed to keeping the cost of enforcement as low as possible, whilst ensuring sufficient capacity to undertake enforcement activity. The Government has also committed to quantifying any cost burdens and may provide funding towards these.
104. Similar to the Energy Performance of Buildings (England and Wales) Regulations 2012, it will be up to landlords and their advisors to satisfy themselves that a property is in compliance with the regulations, and that any evidence required for an exemption is sufficient. TSOs would be empowered to challenge landlords where they consider that a property may not be in compliance, following up on either a compliant or their own intelligence. If a landlord cannot provide sufficient evidence for a valid exemption, the TSO would impose a civil penalty. The Government recognises that challenges exist in identifying landlords and properties that are let in order to target enforcement activities, and would welcome practical solutions to facilitate this.
105. Some landlords may prefer the peace of mind of having confirmation that they have met their obligations under the regulations where they have a valid reason for their property not being able to reach an E rating, for example they have undertaken all measures within the Golden Rule or have had consent for improvements withheld. Whilst there is likely to be more third party involvement in the non-domestic sector than the domestic – with agents and legal advisors seeking to assist landlords to comply - some form of third party certification of exemptions may be welcome to provide certainty to all parties. Furthermore, TSOs may welcome some assistance in identifying those properties that have a valid exemption from reaching an E rating, from those that do not.

Certification of exemptions

106. The Government is exploring ways in which exemptions could be certified by a third party upfront. For example, landlords could be encouraged to voluntarily provide details of any exemption they have from meeting the E standard to their local authority. Where evidence was insufficient the local authority would advise the landlord of this, and where it was sufficient, the local authority would provide written confirmation that they had complied. Landlords could then use this to prove that their property was compliant with the regulations where their property falls below an E rating.

107. For those that would welcome the assurance, this approach would provide certainty to landlords, tenants and their advisors that a property was in compliance and there was no risk of enforcement action, much in the same way a property owner can choose to apply for a Lawful Development Certificate confirming planning permission is not required for works to their property.
108. There may be some cost in providing such a service, which could be met by a small fee chargeable by the local authority. However as the avenue would be optional, landlords could decide whether they wish to pay for the certification service, or simply satisfy themselves that they are in compliance. Consideration would be needed as to reasonable timescales for local authorities to respond to a landlord application, and whether certification could be deemed to be given after a certain period. Clearly this process should not risk holding up transactions.
109. Whilst this option would not tackle those landlords who wilfully ignore the regulations, as there would be no compulsion to come forward, it may also help focus enforcement action as there may be a smaller pool of properties below E where the landlord has not come forward.
110. A more comprehensive approach would be to require all landlords to apply to their local authority to obtain certification of any exemptions for property falling below an E rating. Therefore any landlord found to be letting a property below standard without the express confirmation of a valid exemption from the local authority would risk a penalty.
111. This would make it easier for TSOs to target their enforcement action and would provide certainty to landlords. It would also provide a level playing field for all landlords. This could however entail higher levels of administration as a greater number of applications would come forward.

Consultation Question

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| 11. | Do you consider a route confirming that a property has a valid exemption for letting below an E EPC rating would be helpful, and if so do you think this should be voluntary or mandatory? Do you have any other comments regarding compliance and how Trading Standard Officers (TSOs) could be supported with enforcement, for example in identifying landlords? |
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Powers to request evidence of compliance

112. Should the Government proposals for certification of exemptions be taken forward as outlined above, landlords would be able, or compelled, to come forward for certification of an exemption from reaching an E standard. Regardless as to whether the Government takes forward these options, Trading Standards Officers (TSOs) will be empowered to request landlords show evidence of compliance with the regulations upon request.
113. Where a TSO identifies that a property may be in non-compliance with the regulations (i.e. the property is being let and has an EPC of below an E), a TSO would be able to issue the landlord with a request in writing asking them to:
- a) demonstrate an exemption from meeting the E standard applies (for example consent denial for the required works, or inability to do all the measures required

within the Golden Rule) or provide a certificate of a valid exemption (if the Government proceeds with third party certification),

- b) respond to the notice within 7 days of the request, including any evidence that may be required to support an exemption. This should be sufficient time as a landlord should have satisfied themselves that they had an exemption, and the relevant evidence to support it, before letting the property below an E rating.

114. The precise form of evidence that may be provided by a landlord will depend on the type of exemption that a landlord may feel applies, and therefore could include:

- a) EPCs for pre and post installation works;
- b) The lease for the property;
- c) Green Deal Advice Report;
- d) Written proof to show consent was required for the improvement(s) (for example their lease where the need to obtain consent from a freeholder is stipulated) and consent was denied, for example, from tenants, freeholders or planning permission;
- e) Survey report from an accredited valuer showing a material decrease on the property's value following the improvements;
- f) Green Deal finance quotes that show improvements do not meet the Green Deal Golden Rule.

115. If third party certification of exemptions was taken forward, a landlord would only need to provide certification of their exemption to evidence compliance.

Penalties

116. The Government proposes that should the landlord not respond to a TSO request to provide evidence of an exemption, or should the TSO consider that a landlord's evidence was inadequate or false, the TSO may issue a penalty notice in writing to the landlord. A TSO may however use their discretion and not issue a penalty notice where they feel the landlord had made a genuine error in attempting to comply. When issuing a penalty notice to a landlord, the Government proposes that the penalty notice should (at least) state the:

- a) reason for the breach of the regulations;
- b) size of penalty charge;
- c) the date by which the landlord must respond if they dispute the reasons provided for the penalty, not less than 28 days from the date of the penalty notice;
- d) the date by which a landlord must pay the penalty, not less than 28 days from the date of the penalty notice.

117. The formula for calculating a penalty for non-compliance should be set at a level to persuade landlords to comply, and ensure a degree of proportionality to reflect the scale of benefit that a landlord may have received from the property during the period of non-

compliance. One approach would be to set the penalty with reference to the rent received for the period of non-compliance as is proposed for the domestic sector regulations, however rent free periods are commonly provided in non-domestic leases which would complicate and potentially undermine the penalty calculation.

118. The Government's preferred formula for calculating penalties for the non-domestic sector is to use a percentage of the rateable value of the property. This would ensure proportionality and simplicity for enforcement agents. A fixed penalty would need to apply where the formula could not be applied (for example where the property falls within a minority of buildings exempt from business rates), and there may be merit in establishing a minimum and a maximum penalty level. Evidence would be welcome as to whether this is the most appropriate basis to set the penalty, and if so what level to set the penalty thresholds.
119. Should a landlord respond to the TSO with a valid reason why the penalty had been imposed wrongly, the TSO may waive the penalty. Alternatively a TSO may choose to provide the landlord with more time to demonstrate why a penalty had been wrongly imposed, should they wish to do so.
120. Following the issuing of a penalty notice, the landlord would have six months to comply with the regulations. If after this six month period the landlord had not complied the TSO may issue another penalty notice. The usual exemptions for reaching the E standard would apply in this instance, therefore for example where a sitting tenant refused consent, the landlord would retain evidence of this as a valid exemption. The penalty regime will never require that a landlord remove their tenant in order to comply with the regulations. If penalties are not paid they may be recoverable as civil debt.
121. The Government will develop guidance for local authorities and the sector to help ensure the enforcement requirements are understood and easy to follow.

Consultation Question

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| 12. | Do you agree that the penalty for non-compliance should be linked to a percentage of a property's rateable value? If so, what percentage should this be? If not, what alternatives do you suggest? Should the Government set a minimum and maximum fine level, and if so at what levels should these be set? |
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Appeals

122. The recipient of the penalty notice may be able to give notice within 28 days that they challenge a TSO's penalty notice. The TSO will consider any representations made by the recipient and all other circumstances of the case and then decide whether to confirm or withdraw the notice.
123. The regulations will make provisions for a landlord to be able to appeal any penalties imposed at a tribunal or court. The Government proposes that appeals relating to the regulations will be heard at the First-tier Tribunal. Following the response to any landlord challenge to the penalty charge notice, the recipient may appeal the TSO's decision at the First Tier Tribunal within a further 28 day period. The appeal would be on the grounds that the recipient did not commit a breach of the regulations as specified in the penalty notice, the notice was not given with the correct timescales or in the circumstances of the case it was not appropriate for the notice to be given to the recipient.

Provision will be made to appeal a ruling made by the First-tier Tribunal at the Upper Tribunal.

Tribunals overview

124. The First-tier Tribunal and the Upper Tribunal were created by the Tribunals, Courts and Enforcement Act 2007. The First-tier Tribunal is part of Her Majesty's Courts Service. The First-tier Tribunal is empowered to deal with a wide range of issues which might form the substance of appeals, and to ensure the cases are dealt with in the interests of justice and in a manner which minimises parties' costs. The First-tier Tribunal system is already used as the appeals process for a number of UK policies managed by DECC, such as the EU ETS and Green Deal.
125. The composition of a Tribunal is a matter for the Senior President of Tribunals to decide and may include non-legal members with suitable expertise or experience in an appeal in addition to Tribunal judiciary. The First-tier Tribunal is divided into several different chambers. The General Regulatory Chamber brings together various different jurisdictions of a regulatory nature, including environmental regulations.
126. If the First-tier Tribunal is selected as the appropriate body to hear appeals against penalties relating to non-compliance with the minimum standard regulations, it would operate under the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009¹⁸ which provide flexibility for dealing with individual cases. The General Regulatory Chamber Rules state its overriding objective as being to deal with a case fairly and justly. This includes dealing with a case in ways which are proportionate to the importance of the case, the complexity of the issues and the anticipated costs and resources of the parties. The Rules give the Tribunal judge wide case management powers in order to achieve these objectives.
127. Any party to a case has a right to appeal to the Upper Tribunal on points of law arising from a decision of the First-tier Tribunal. The right may only be exercised with the permission of the First-tier Tribunal or the Upper Tribunal. Where permission is given, the further appeal would be made to the Upper Tribunal. Under the Rules the First-tier Tribunal has the power to award costs against a party where it considers that a party has acted unreasonably in bringing, defending or conducting the proceedings.

Consultation Question

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| 13. | Do you consider that the First-tier Tribunal is the appropriate body to hear and determine appeals about decisions regarding non-compliance with the minimum standard regulations? Do you consider that the General Regulatory Chamber Rules of the First-tier Tribunal will suit the handling of these appeals? If not, what tribunal could be used? |
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¹⁸ <http://www.justice.gov.uk/tribunals/rules>

Miscellaneous questions

Consultation Question

14. Do you have any comments not raised under any of the above questions?

Consultation Question

15. Do you have any comments or evidence regarding the consultation impact assessment that could inform the final impact assessment, for example the average length of void periods or length of tenant stay in different sectors?

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