

EXPLANATORY MEMORANDUM TO
THE ENERGY PERFORMANCE OF BUILDINGS (CERTIFICATES AND
INSPECTIONS) (ENGLAND AND WALES) (AMENDMENT)
REGULATIONS 2009

2000 No. 1900

1. This explanatory memorandum has been prepared by The Department for Communities and Local Government and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument has two purposes. The first is to promote the adoption of measures to improve the energy performance of dwellings. It concerns the disclosure of energy performance certificates for dwellings and their accompanying recommendation reports from the register of such documents maintained on behalf of the Secretary of State pursuant to the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 ('the principal regulations'). It provides for the disclosure of such documents in the lowest categories of performance to the Energy Saving Trust Limited ("EST") when dwellings are sold, to allow EST to provide owners and occupiers with information about measures to improve the energy performance of those dwellings and about financial assistance for taking such measures that may be available to them.

2.2 The second purpose of this instrument is to correct an anomaly that has become apparent in relation to the restrictions in the principal regulations on disclosure of display energy certificates, by removing any restriction on their disclosure by the keeper of the register to an officer of the Secretary of State for Communities and Local Government.

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

3.1 None

4. Legislative Context

4.1 This instrument gives effect to the commitment made by the Prime Minister in November 2007 that a green homes service will make information on measures for improving energy efficiency and financial assistance available for taking such measures to every householder who, when a house is sold, receives an energy performance certificate showing a performance rating in bands F and G. F and G are the lowest categories of performance. The green homes service is operated by EST and is part of the wider "Act on CO²" initiative.

4.2 The principal regulations contain restrictions on disclosure that, in respect of display energy certificates, may prevent the disclosure to the public of documents that are in the public domain in any event,

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

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

7. Policy background

What is being done and why

7.1 This instrument is made under the powers in section 2(2) of the European Communities Act 1972 and concerns matters arising out of our obligations in respect of Directive 2002/91/EC of the European Parliament and of the Council of 16th December 2002 on the energy performance of buildings. The principal regulations give effect to the requirements of Article 7 in two ways. They provide first for the making available of energy performance certificates and recommendation reports to prospective buyers or tenants of buildings and to owners of newly erected buildings. They provide secondly for the display in a prominent place clearly visible to the public of display energy certificates by the occupiers of public buildings and buildings occupied by institutions providing services to the public, who must also be in possession of an advisory report for the building. For purposes including authentication and quality control of certificates and reports the principal regulations also provide that those documents be entered in a register. The register is to be kept by the Secretary of State or by another person on the Secretary of State's behalf. An external contractor is currently the register keeper under this provision.

Provision for disclosure to EST

7.2 The provisions in this instrument for disclosure to EST relate principally to the following Directive Articles. These are: the general objective in Article 1 to promote the improvement of the energy performance of buildings, the specific obligation in Article 7 that the energy performance certificate be accompanied by recommendations for the cost-effective improvement of energy performance and the provision in Article 12 that Member States may take the necessary measures to inform the users of buildings as to the different methods and practices that serve to enhance energy performance. An updated transposition note for the specific obligations in Articles 7 to 10 of the Directive, including references to such other Articles as are of relevance to our transposition of them, is available on the Department's website www.communities.gov.uk.

7.3 EST is a private not-for-profit company established on the initiative of Government and funded by the Government and the private sector. Its purposes are to work to combat climate change and help reduce carbon dioxide emissions by promoting energy efficiency and the use of renewable sources of energy in all spheres of activity and to alleviate fuel poverty.

7.4 The provision for disclosure of energy performance certificates in bands F and G and their accompanying recommendation reports, which includes disclosure of information derived from either document, will allow EST to fulfil the Prime Minister's 2007 commitment. The principal regulations provide that an energy performance certificate must show an asset rating for the building, expressed in accordance with the methodology of calculation of the energy performance of buildings approved by the Secretary of State pursuant to regulation 17A of the Building Regulations 2000. The asset rating as approved for dwellings consists of two graphs: an energy efficiency rating relating to the cost of energy used by the dwelling, and an environmental impact rating relating to its carbon dioxide emissions. Both show performance in bands lettered A to G. The certificate is always accompanied by a recommendation report. The report points out measures that can be taken to improve the energy performance of the building that will be cost-effective in the shorter term, and more costly measures that may only pay for themselves over a longer timescale. The certificates disclosed under this provision will show that the dwelling falls in band F or G, and the disclosure of the recommendation report will allow EST to offer advice on a basis that is suitable for the characteristics of the individual dwelling concerned.

7.5 The disclosure provision contained in this instrument replaces a provision for disclosure to EST that was inserted by the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment No. 2) Regulations (S.I. 2008/2363) in October 2008. That provision was restricted to disclosure of the address of dwellings in specified categories of energy performance only, and was inadequate for the purposes of the green homes service as it did not allow disclosure of the useful information in the certificate and, particularly, the recommendation report.

7.6 The register of energy performance certificates is maintained on behalf of the Secretary of State. The Department has agreed arrangements relating to the operation of the disclosure provisions with EST. All certificates in categories F and G for dwellings offered for sale or sold and their recommendation reports will be released to EST by a secure data transfer. EST will receive Land Registry data on completed sales at regular intervals, and check these against the energy performance certificates which they hold. Where there is a match, a letter will be written after an interval to the occupier of the dwelling. The letter will bear the "Act on CO²" logo, and be addressed neutrally to "the resident" at the address. It will point to the potential for energy saving and possible measures to achieve this identified in the energy performance certificate and recommendation report. It will invite the recipient to contact EST to discuss these and other measures to save energy, and to

receive advice on grants or offers that may be available to assist in taking them up.

7.7 The Department is responsible for ensuring that disclosure made to EST under this provision is compliant with the law relating to data handling and privacy issues. In particular, as the energy performance certificate contains an address it is arguably personal data under the Data Protection Act 1998. This is because enquiries made by reference to the address could connect the data in the certificate and the recommendations report with persons living there. Accordingly, the Department has elected to treat the material disclosed as personal data. The view has been taken that in the present context the public interest in releasing the data to EST to enable the provision of the information described justifies any processing of personal data concerned. The information requirements of the Act will be satisfied by the inclusion in every energy performance certificate registered on or after 10th May 2009 of words informing the holder that the certificate and recommendation report are liable to be disclosed to EST for the purposes of providing information on measures to improve the energy performance of the dwelling and any financial assistance that may be available for taking such measures, and of words indicating that the Department is the data controller. Only certificates registered on or after 10th May 2009 will be disclosed under this provision. Further in compliance with the Data Protection Act, the Department has agreed with EST a number of measures to ensure the secure handling of the data disclosed by EST, its mailing services provider, and its advice centre contractors, and to ensure the deletion of the data disclosed once a sufficient period to allow for mailing to be effective has passed. This period will be eighteen months from when any document is first disclosed, whether or not any sale of the dwelling has been registered. For similar reasons to those described in relation to data protection issues, the Department considers the provision justified also in relation to the law on human rights and on confidentiality.

Disclosure of display energy certificates to an officer of the Secretary of State for Local Government

7.8 The registers of energy performance certificates and recommendation reports and display energy certificates and advisory reports are not open to the public. The Secretary of State is responsible for the registers, though an outside contractor performs the function of register keeper on the Secretary of State's behalf. The keeper may only make disclosures from the register where allowed to by express provision in Part 6 of the principal regulations. These provisions allow for disclosure of different levels of information and subject to different qualifications to various persons, for example to enforcement authorities and to energy assessors' accreditation schemes. Among the persons to whom the keeper may make disclosures is any officer of the Secretary of State for Communities and Local Government, subject to conditions. Those conditions are that any document or data from the register may be disclosed only for the purpose of enabling the Secretary of State to monitor the application and enforcement of, and compliance with, the duties imposed by the principal regulations, or for statistical or research purposes, provided in

either case that no particular property is identifiable from the document or data disclosed.

7.9 Meanwhile any request for disclosure of information from the register made by any person otherwise than in accordance with an express disclosure provision will be directed to the Secretary of State as having the overall responsibility for the register. However, any disclosure by the register keeper in these circumstances is restricted to the terms of the provision for disclosure to an officer of the Secretary of State for Communities and Local Government described above. These provisions create an artificial obstacle in cases where the Department is asked to provide information concerning display energy certificates. There is no overriding reason of principle to withhold information on individual display energy certificates, which are of their nature public documents, and are on open view in the buildings to which they relate. In these circumstances the amendment allows the register keeper to disclose any display energy certificate to an officer of the Secretary of State for Communities and Local Government, which enables the Department to disclose them in turn in appropriate circumstances.

- ***Consolidation***

7.10 There are no plans at present to consolidate the principal regulations and the amendments to them. For ease of reference however a text of the principal regulations as amended to date, including by this instrument, will be made available on the Department web site when this instrument is laid before Parliament. Nevertheless, only the principal regulations and the amending instruments themselves have the force of law.

8. Consultation outcome

8.1 In relation to disclosures to EST, the Department consulted a wide range of stakeholders through its stakeholders' forums and published the consultation 'The Next Steps: EPCs and the establishment of the Green Homes Service'. This concerned disclosure to EST as now provided for in this instrument, and certain other disclosure proposals that were enacted in the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment No. 2) Regulations 2008. The consultation ran from June 2008 to 1 September 2008. The Department received 45 responses of which 30 were in favour of the proposal for disclosure from the register of energy performance certificates in bands F and G and their accompanying recommendation reports to EST and other proposed amendments concerning disclosure from the register and 6 against. 9 respondents expressed agreement with the proposals without specific comment on any of them.

8.2 Among those who opposed the proposals, concern was expressed on the commercial implications of singling out of the EST to receive disclosures and about data security in relation to such disclosures. The Department considers that these topics do not give grounds for concern in practice. The status and purposes of EST, and the circumstances in which disclosure will be made to EST have been described above. In particular, the arrangements

between EST and the Department make it clear that any advice given to a dwelling occupier or owner will be impartial and that no particular scheme or offer will be recommended other than on grounds of its suitability in relation to the measures recommended and to the stated needs of the consumer. The arrangements also make strict provision for data security and compliance with data handling law. Any failure to comply with those understandings may lead to the suspension of the disclosure process by the Department. In addition to the arrangements however, this instrument amends regulation 14(2)(de) of the principal regulations to make it explicit that any disclosure by EST or others of the documents disclosed to EST other than in furtherance of the purposes of EST as defined in the regulations is an offence, triable summarily and punishable by a fine not exceeding level 5 on the standard scale. Thus any disclosure to third party interests would incur a criminal sanction.

8.3 The consultation document, summary and an analysis of the responses are available on the Department's website www.communities.gov.uk.

8.4 On the question of disclosure of display energy certificates to an officer of the Secretary of State for Communities and Local Government, no consultation has taken place. These provisions remedy an anomaly in the principal regulations, and accordingly there is no scope for useful consultation on this topic.

9. Guidance

9.1 Stakeholder guidance is not required in relation to the provision for disclosure to EST, as its operation is covered fully by direct dealings between EST and the Department. Similarly stakeholder guidance is not required in relation to disclosure of display energy certificates to an officer of the Secretary of State for Communities and Local Government, which concerns dealings between the register keeper and the Department.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector except as described in paragraph 10.3.

10.3 An impact assessment has not been produced in relation to disclosure to EST. This is first because any additional benefits are marginal over those already taken into account in the assessment "Regulatory Impact Assessment Energy Performance of Buildings Directive Articles 7-10", as these proposals will help deliver those benefits rather than produce independent benefits of their own. It is secondly because the costs are only to the public sector and below £5m.

10.4 No impact assessment has been produced in relation to disclosure of display energy certificates to an officer of the Secretary of State for

Communities and Local Government, as this is being provided for in order to deal with an anomaly and has no specific impact or costs.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring and review

12.1 EST will be monitoring a number of performance indicators in relation to the operation of the information programme facilitated by this provision on an ongoing and regular basis. Monitoring data will be used to manage programme delivery and for purposes of evaluation. No monitoring is required in relation to disclosure of display energy certificates to an officer of the Secretary of State for Communities and Local Government, as this is being provided for in order to deal with an anomaly.

13. Contact

Katherine Higley at the Department of Communities and Local Government
Tel: 020 7944 5592 or email: Katherine.higley@communities.gsi.gov.uk can answer any queries regarding the instrument.