



Alert

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CS&F: Business Recovery & Insolvency



Energy Performance Certificates

The issues for Insolvency Practitioners on disposal of property

What is an Energy Performance Certificate (EPC)?

The Building and Approved Inspectors (Amendments) Regulations 2006 and the Energy Performance of Buildings (Certificates and Inspections) Regulations 2008 (the "Regulations") have introduced, in stages, a requirement to provide an EPC on the construction, modification, selling or letting of a commercial building.

Since 1 October 2008 the Regulations have applied to **all** commercial buildings, with a few, very limited exceptions.

A "building" for the purposes of the Regulations is any roofed construction having walls, for which energy is used to condition the indoor climate. This definition catches virtually all commercial premises.

An EPC is a certificate issued by an accredited Energy Assessor that expresses the "asset rating" of the building. This relates to the energy performance of the building, expressed in terms of a CO₂ based index. A "Recommendation Report" will accompany the EPC, providing recommendations for improving the energy efficiency of the building. Presently, there is no requirement to action any of the recommendations contained in the Recommendation Report.

Failure to provide an EPC to the proposed buyer, tenant or assignee may result in the seller company being fined up to £5,000. Enforcement is by the local Trading Standards officer. The Regulations do not prohibit this fine being levied repeatedly until the breach is remedied and the EPC obtained and supplied.

The enforcement period for failure to supply an EPC is six months from the last date the EPC should have been supplied, usually exchange of contracts. After this date, the enforcement officer cannot commence action against a defaulting seller, although this will not prohibit the enforcing officer from continuing to pursue a breach notified prior to the expiry of the six month limitation period.

How this affects you

The Regulations apply to the sale or letting of freehold or leasehold commercial premises. They require a 'seller' to provide the EPC at the earliest possible opportunity during any transaction and no later than formal exchange of contracts. If you are in the process of selling, letting, or assigning an interest in commercial premises, you will need to provide an EPC at the earliest opportunity to the proposed buyer, tenant or assignee.

The cost of the EPC is for the seller. The cost will depend on the size, type and location of the property.

There are anti-avoidance provisions in the Regulations to prevent you from passing on the cost of obtaining the EPC to the buyer, for example by an increase in the purchase price (however expressed) that appears to pass on the cost of obtaining the EPC to the buyer. The buyer cannot waive the requirement to provide the EPC, nor can you seek an indemnity from the buyer against any fines levied for non-compliance. Even if the

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EPC is not requested as a standard pre-contract enquiry, the statutory obligation to obtain the EPC at your cost remains with you.

An EPC can only be provided by a duly qualified and accredited Energy Assessor. If your selling agent or valuer cannot assist you in arranging this, we shall be happy to help you instruct an Energy Assessor. The Energy Assessor should be asked for a quote before you confirm instructions.

As the appointed insolvency practitioner, you typically act as agent of the seller company. As the primary liability for obtaining the EPC rests with the company, in theory any fine levied against the company for failure to provide an EPC would rank only as an unsecured claim against the company. However, we consider that, in your capacity as office holder and as an officer of the Court, you are obliged to take steps to comply with this statutory requirement and the cost of obtaining the EPC should properly be treated as an expense of the administration, liquidation or other insolvency process.

If advising the buyer you will be keen to obtain the EPC. An EPC is valid for a period of ten years from the date of issue and so can be passed on to a subsequent buyer or tenant at no cost.

Short –Term Occupation: Tenancy at Will vs. Licence to Occupy

Often in a sale of the business and assets of the company as a going concern, the proposed buyer requires a short-term right of occupancy of the trading premises in order to immediately take over the business and maintain continuity of trade. Typically this is achieved by a tenancy at will or licence to occupy, whilst the buyer negotiates with the landlord for an assignment or novation of the company's lease of the premises.

Unfortunately the Regulations require an EPC to be provided even where the right of occupancy is temporary and the buyer is not paying a rent or other premium to you but is simply indemnifying the seller against the ongoing rents and other liabilities accruing under the lease.

The Regulations **will apply** to a tenancy at will that grants exclusive rights of occupation to the buyer but **will not apply** to a non-exclusive licence to occupy the premises.

Allowing the buyer into occupation on a licence, rather than a tenancy at will, may temporarily avoid the need to provide an EPC. However, there are other issues to consider:

- A tenancy at will is specifically excluded from the operation of the security of tenure provisions of the Landlord and Tenant Act 1954 and therefore its use in these circumstances is recommended. It

most accurately reflects the short-term arrangement between seller and buyer and runs minimal risk of creating any security of tenure in favour of the buyer, without the need to follow the statutory notice procedure to formally exclude these rights. Such a tenancy can be terminated immediately, for example where the landlord is pressing for the return of the premises or the buyer is not honouring its contractual obligations.

- A licence to occupy is also excluded from the security of tenure provisions, provided the term does not exceed six months. However, you can inadvertently grant the buyer security of tenure if the selling company (as predecessor in title) has already been in occupation and carrying out the same business from the premises for more than 12 months prior to the granting of the licence, regardless of the length of the licence you grant to the buyer.
- The Regulations only permit that a genuine non-exclusive licence to occupy will be excluded from the need to provide an EPC. If the buyer is allowed into exclusive occupation, then there is a danger that the arrangement could be held to operate as a tenancy, not a licence (regardless of how it was described).
- If you allow a buyer into occupation under a non-exclusive licence, ensure that the seller company continues to assert control over the premises and follows the statutory notice procedure to exclude the licence from the protection of the Landlord and Tenant Act 1954. Additionally, negotiate for a right to terminate the licence at short notice to minimise the risk of the creation of a fixed-term right of occupancy.
- If, as part of a sale, you agree to sell or otherwise transfer the company's interest in the premises to the buyer, you will need to provide an EPC in any event as part of that assignment process. In this situation, nothing is gained by using a licence to occupy and we would recommend using a tenancy at will where possible.

Practical Considerations

The introduction of the Regulations has caused a sudden demand for EPCs. This, together with a lack of accredited Energy Assessors, means there is considerable delay in obtaining EPCs and it may not be possible to obtain an EPC within the time frame of a proposed completion.

To minimise the possibility of attracting a fine for non-compliance, you need to demonstrate that you have taken necessary steps to arrange for the delivery of the EPC, including paying the Energy Assessor's fee, and that you have actively chased the Energy Assessor to provide the EPC.

Our current experience is that buyers and their advisors are willing to take a pragmatic view and complete without the EPC, provided that you have given a suitable assurance that it will be delivered as soon as possible after exchange of contracts. However, such an arrangement does not excuse you from your obligation to provide the EPC and under the transitional provisions that are in force, even where the property was on the market prior to 1 October 2008, the last date by which you MUST have supplied an EPC in such cases is 4 January 2009. We recommend that you discuss this as a matter of urgency with your professional advisors to ensure an EPC can be obtained by this date, to avoid any potential liability for non-compliance.

The period of enforcement of a breach of the Regulation is only six months from exchange of contract. Where you are intending to allow the buyer a short-term right of occupation only, with no intention of transferring the company's interest in the premises, you may take a commercial view as to the likelihood of the local trading standards enforcement officers taking action before the right of occupation ceases and the liability period expires. We cannot recommend such an

approach. Instead, you should utilise a licence to occupy in such circumstances.

Even where the proposed assignment of the lease of the commercial premises is for nil consideration, you are obliged to provide an EPC. Depending on the premises, the cost could be significant. In such circumstances, we recommend that you either ask the landlord to obtain the EPC as part of the assignment (this is not prohibited by anti-avoidance provisions in the Regulations), or negotiate for a surrender of the existing lease and the grant of a fresh lease to the incoming tenant. This would also push the cost of providing the EPC on to the landlord.

Contact

This is only a brief summary of the impact of the new Regulations and specialist advice should be sought in connection with any proposed sale, letting or assignment of any commercial premises that may be affected. Hammonds will be delighted to assist you with this process.

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