Tenant Fees Act 2019

STATUTORY GUIDANCE FOR ENFORCEMENT AUTHORITIES

Contents

1. Introduction

This document has been prepared as a guide for enforcement authorities to help them understand how to use their new powers to enforce the Tenant Fees Act 2019 (the “Act”).

The Government wants a fair private rental market where services are paid for by the person that contracts them. This is what the Tenant Fees Act 2019 helps to achieve.

Significant progress has been made in recent years to improve property standards, professionalise the sector, strengthen consumer protection for tenants and tackle rogue landlords and letting agents. The legal framework underpinning the private rented sector (“PRS”) aims to build a fair and robust sector that protects tenants, supports landlords and empowers local authorities.

The Tenant Fees Act 2019 should be considered alongside other legislation that gives local authorities the power to protect tenants and tackle poor practice by landlords and letting agents. Other relevant legislation includes the Housing Act 2004; client money protection regulations; The Client Money Protection Schemes for Property Agents (Approval and Designation of Schemes) Regulations 2018 S.I. 2018/751, The Client Money Protection Schemes for Property Agents (Requirement to Belong to a Scheme etc.) Regulations 2019; the Enterprise and Regulatory Reform Act 2013; the Consumer Rights Act 2015 and the Housing and Planning Act 2016, that give local authorities the power to protect tenants and to tackle poor practice by landlords and letting agents.

2. Purpose and Scope

2.1 What is the status of this guidance?

Local authorities that carry out enforcement activity under the Tenant Fees Act 2019 must have regard to this guidance. It should be read alongside the Tenant Fees Act 2019.

Further information on the provisions of the Tenant Fees Act 2019 can be found in the consumer guidance at: https://www.gov.uk/government/collections/tenant-fees-act.

Where the words "must" or "shall" are used, this means the guidance reflects a statutory requirement. Where the words "may" or "should" are used, this means that a course of action is recommended or advised, but it is not mandatory.

2.2 What does the guidance cover?

This guidance covers the Tenant Fees Act 2019, changes to Section 83 and 87 of the Consumer Rights Act 2015, changes to Section 85 of the Enterprise and Regulatory Reform Act 2013, Article 7 of the Redress Schemes for Letting Agency Work and Property Management work (requirement to belong to a scheme etc (England) Order 2014 and changes to Section 135 of the Housing and Planning Act 2016. The Government will issue separate guidance on letting agents' duties to provide client money protection.

Government has produced separate guidance for tenants, landlords and letting agents to help consumers understand how the Act affects them.

2.3 Who can enforce?

In the Act, "enforcement authority" means either a local weights and measures authority in England, or a district council that is not a local weights and measures authority:

a) Local weights and measures authorities ("Trading Standards") – it is the **duty** of every local weights and measures authority in England to enforce in its area:

   - Section 1 (prohibitions applying to landlords),
   - Section 2 (prohibitions applying to letting agents), and
   - Schedule 2 (treatment of holding deposits).

b) District councils – a district council that is not a local weights and measures authority **may enforce** sections 1, and 2, and Schedule 2.

c) The lead enforcement authority – the lead enforcement authority **has the power** to take steps to enforce the relevant letting agent legislation where necessary or expedient to do so (further information is in section 5 of this guidance).

2.4 When do these powers come into force?

Commencement – The Act's main provisions come into force on 1 June 2019 (the "commencement date") and will apply to all applicable new tenancy agreements. The requirements of the Act relating to holding deposits will not apply to holding deposits paid before the commencement date.

Transitional period – The Act allows a transitional period of one year from the commencement date for tenancy agreements that were entered into before commencement of the Act ("pre-commencement tenancies"). Pre-commencement tenancies are:

a) Tenancies entered into (signed) before the commencement date; and

b) Statutory periodic tenancies that arose during the year after commencement.

For the first year after commencement the prohibitions in sections 1 & 2 of the Act will not apply to pre-commencement tenancies. After the transitional period, on 1 June 2020, the Act applies to all applicable tenancy agreements regardless of the date when the agreement was entered into. Any term that is prohibited by the Act in a tenancy agreement entered into prior to the commencement date would cease to be binding on the tenant and any enforcement of the term by a landlord or agent would be prohibited from the end of the transitional period. Where a landlord accepts a payment under such a term and does not return it to the tenant within 28 days, this is a prohibited payment.

Example: a tenancy agreement that was signed before commencement of the Act and has a clause that requires the tenant to pay for a professional cleaning service on exit. This term would be valid between 1 June 2019 and 31 May 2020, but this clause would not be binding on the tenant after 1 year from the commencement date of the Act on 1 June 2020.

The requirements of the Act relating to holding deposits will not apply to holding deposits paid before the commencement date. Landlords are also not required to repay any tenancy deposit that exceeds the cap until a new fixed term tenancy is agreed.

2.5 Relevant Person

For the purposes of the Act and this guidance a "relevant person" is a tenant or a person acting on behalf of a tenant, or who has guaranteed the payment of rent by a tenant but does not include:

a) A local housing authority within the meaning of the Housing Act 1985 (see section 1 of that Act),

b) The greater London Authority, or

c) A person acting on behalf of an authority within paragraph (a) or the Greater London Authority.

3. Application

The Act applies to Assured Shorthold Tenancies ("ASTs"), student accommodation and licenses to occupy housing, in England only. The Act covers licences to occupy housing, to ensure that lodgers or tenants of houses in multiple occupation ("HMOs") also cannot be charged fees. A licence to occupy housing is a personal permission for someone to occupy housing. It does not give the licensee a legal interest in or control of the housing and includes those licenses issued by resident landlords but does not include a license to occupy housing for a holiday (short term holiday lets).

In addition, the Act applies to housing associations and local authorities, where they are letting an AST in the private rented sector.

The Act does not apply to long leases, as defined in Chapter 1 of Part 1 of the Leasehold Reform, Housing and Urban Development Act 1993. Nor does it apply to shared ownership leases as defined by section 7(7) of the Leasehold Reform, Housing and Urban Development Act 1993, where the tenant's total share (within the meaning given by that section) is 100%.

Local housing authorities, the Greater London Authority or organisations acting on their behalf are excluded from the definition of relevant person under the Act and can continue to make payments in connection with a tenancy when acting on behalf of a tenant or guaranteeing their rent.

Certain licences to occupy housing are excluded from the Act and defined as an "excluded licence". An excluded licence is a licence to occupy housing which must be:

a) arranged between the licensee and licensor with the assistance or advice of a registered charity or Community Interest Company (usually a registered Homeshare organisation) in connection with the grant, renewal or continuation of the licence;
b) arranged in order to provide the licensor with companionship sometimes combined with care or assistance (but not financial assistance); and
c) No rent or other consideration is provided other than the companionship sometimes combined with care or assistance (but not financial assistance) by the licensor for the accommodation, but they may receive payments from the licensee in respect of council tax, a utility, a communication service or a television licence.

This exclusion is intended to exclude certain charities that help facilitate home sharing arrangements in the private rented sector which have a social benefit. For example, the prevention of loneliness of the elderly. A national charity, Shared Lives Plus, provides membership to UK Homeshare organisations and a register of its members is available here: https://homeshareuk.org/. Further guidance on Homeshare can be sought from Shared Lives Plus. 4. Provisions of the Act

4. Provisions of the Act

4.1 What are the provisions of the Act?

From 1 June 2019 landlords or agents will no longer be able to require tenants in the private rented sector in England, or any persons acting on behalf of a tenant or guaranteeing the rent, to make certain payments ***in connection with a tenancy***. A definition of letting agent work is at Annex A of this guidance.

In the legislation "***in connection with a tenancy"*** is defined as requirements:

- in consideration of, or in consideration of arranging for, the grant, renewal, continuance, variation, assignment, novation or termination of a tenancy;
- on entry into a tenancy agreement containing relevant provisions;
- pursuant to a provision of a tenancy agreement, or pursuant to an agreement relating to such a tenancy with a letting agent, which requires or purports to require the person to do any of those things in the event of an act or default of the person or if the tenancy is varied, assigned, novated or terminated; and
- as a result of an act or default related to the tenancy unless pursuant to, or for breach of, a tenancy agreement or other agreement; and
- in consideration of providing a reference for a former tenant.

In essence this covers any fee or charge related to a tenancy except for those expressly permitted in Schedule 1 of the Act. Any such payment will be a prohibited payment under the Act.

A landlord or agent must not require a tenant to make payments or enter a contract for the provision of a service or a contract of insurance with a third party or require a tenant to make a loan.

An agent who provides a service to a tenant, and as part of that service finds a house to rent, which the tenant then rents, is not caught by the ban provided that the agent does not also work for the landlord of the house the tenant is seeking to rent. This is the case even if the agent does not act for the landlord for the specific property in question but works for the landlord more broadly. The agent is not permitted to charge fees if they do work for the landlord. For example, a relocation agent that finds a property to rent on behalf of a tenant but does not also work for the landlord of that property (or for any other property) can charge the tenant, by whom they have been contracted, fees.

The approach to implementing this policy has been to ban all fees except those expressly permitted in Schedule 1 of the Act.

The permitted payments are:

a) the rent;

The rent should be paid at regular and specified intervals. The amount charged should usually be equally split across the tenancy. In the first year of the tenancy, a landlord or agent must not charge the tenant more at the start of the tenancy as opposed to a later period. For example, if a landlord or agent requires a tenant to pay £800 in month one and £500 in month two onwards, the surplus of £300 in month one will be a prohibited payment.

Within the first year of a tenancy a landlord or agent cannot reduce the level of rent to be paid unless they have agreed this with the tenant after the tenancy has begun or under a rent review clause in the tenancy agreement, which allows for both a rent increase or decrease. A tenant can agree with a landlord or agent that they will pay a different level of rent in the second and subsequent years of the tenancy.

b) a refundable tenancy deposit capped at no more than five weeks' rent, where the annual rental income is below £50,000 and six weeks' rent for properties with an annual rental income of £50,000 or more;

This is a refundable payment that a landlord or agent may ask a tenant to pay to be held as security for the performance of any obligations of the tenant or discharge of any liability arising under or in connection with the tenancy. A landlord or agent is not legally required to take a deposit. A landlord or agent must not ask for a deposit which is more than five weeks' rent for properties where the annual rental income below is £50,000. It is expected this will apply to the majority of tenancies.

Tenancies with an annual rental income of £50,000 or higher, a landlord or agent must not ask for a deposit which is more than six weeks rent. Properties with an annual income of £100,000 are not be covered by the Act as they are not capable of being assured shorthold tenancies.

For example, where there are three tenants who are jointly liable for a total weekly rent of £240, the landlord or agent cannot ask each tenant to pay a tenancy deposit of up to five times the total weekly rent (5 x 240 = £1200). The maximum this group of tenants could be asked to pay as a tenancy deposit between them would be £1200. They may then choose to split this equally so that each person would pay £400.

Any deposit that a landlord or agent requests for an assured shorthold tenancy must be protected in one of the three Government backed tenancy deposit schemes within 30 days of them taking the payment.[1] This is the tenant's money and a landlord or agent will need to provide evidence to substantiate the reasons for any deductions from the deposit at the end of the tenancy.

[1] https://www.gov.uk/tenancy-deposit-protection

c) a refundable holding deposit (to reserve a property) capped at no more than one week's rent;

A landlord or agent can ask a tenant to pay a holding deposit to demonstrate their commitment to rent the property whilst they undertake relevant reference checks. They cannot ask for a holding deposit which is more than one week's rent. If they do, any amount above one weeks' rent will be a prohibited payment (this cap is based on the total agreed rent for the property).

For example, if there are three tenants who are jointly liable for the agreed total weekly rent of £240, the landlord or agent cannot charge each tenant a £240 holding deposit. The maximum this group of tenants could be asked to pay as a holding deposit between them would be £240. They may then choose to split this equally so that each person would pay £80.

A landlord or agent must refund the holding deposit if the tenant signs a tenancy agreement with them or if they decide to pull out of the arrangement with the tenant or fail to enter a tenancy agreement before the agreed deadline. A landlord or agent can retain the holding deposit if the tenant fails a right to rent check, withdraws from the application process or if the landlord and agent take all reasonable steps to enter the tenancy but the tenant does not.

N.B. The deadline for agreement is the date by which agents/landlords and tenants should enter into a tenancy agreement after payment of the holding deposit. The default deadline for agreement is 15 days following the receipt of the holding deposit, but the landlord or agent may agree in writing a longer deadline with the tenant.

A landlord or agent is also entitled to retain a holding deposit if the information provided is false or misleading information. However, they can only take this information into account where the difference between the information provided and the correct information, or the conduct of the tenant in providing it, reasonably affects the landlord's decision to grant the tenancy.

This is likely to be the case only where the mistake casts doubt on the tenant's financial suitability or honesty, for example:

- the income declaration was significantly too high because of a typo – even if the typo was an unknown error;
- a clear lie about income or employment – even if the landlord would have been satisfied with the correct information;
- failure to disclose (provided that the tenant has been directly asked) any relevant information which later comes to the landlord or agent's attention, such as a valid County Court Judgment.

A landlord or agent cannot retain a holding deposit if the false or misleading information provided, or conduct in providing it, is not relevant to the individual's suitability as a tenant, for example:

- where a tenant has misspelled their name, the name of their employer or a previous address;
- the tenant omitted to declare a previous address – and the omission had no bearing on their credit worthiness or other assessment of suitability;
- the tenant slightly misjudged their income but not in any way that affects their ability to afford the rent.

Where a landlord or agent retains the holding deposit, they must provide reasons in writing to the tenant within 7 days of the decision by the landlord not to enter into a tenancy agreement or the expiry of the deadline for agreement. If they fail to do so the landlord or agent must refund the holding deposit.

Landlords and agents are entitled to retain the full holding deposit if any of the grounds for retention are met although the accompanying guidance for landlords and agents encourages them to only retain money to cover any costs incurred.

A landlord or agent must not receive subsequent holding deposits for the same property, where the first holding deposit has not been repaid unless the earlier deposit was lawfully retained under schedule 2. This is intended to prevent landlords or agents taking multiple holding deposits from different prospective tenants for a property at the same time.

If a landlord or agent fails to return the holding deposit within 7 days of the parties entering into a tenancy agreement, the date of the decision by the landlord or agent not to enter into a tenancy agreement, the parties failing to enter into agreement before the deadline for agreement, or fail to provide in writing why a holding deposit has been retained or retains a holding deposit in a situation where the landlord or agent imposes a requirement which breaches the ban or acts in a manner towards the tenant or relevant person in such a way as it would be unreasonable to expect the tenant to enter the tenancy, they will be liable for a financial penalty of up to £5,000.

d) payments in the event of a default of the tenant

A landlord or agent may only charge a default fee under a term of the tenancy agreement in respect of a replacing a lost key or other security device to give access to the housing or late payment of rent.

Any charge for a lost key or security device giving access to the housing must not exceed the landlord or agent's reasonable costs incurred and must be evidenced in writing to the person who is liable for the payment.

A landlord or agent may charge in the event of late payment of rent for payment that has been outstanding for 14 days or more and with interest at no more than an annual percentage rate of 3% above the Bank of England's base rate for each day that the payment is outstanding.

The Act does not affect the landlord's entitlement to recover damages for breach of the tenancy agreement by way of a deduction from the tenancy deposit or otherwise or an agent's entitlement to recover damages for breach of an agreement between them and a relevant person.

A default fee is a payment required under an express term in the tenancy agreement that provides that a tenant is required to make a payment in the event of a lost key or other security device giving access to the housing or a late rent payment. Damages on the other hand are the general remedy available for breach of contract and will encompass other contract breaches under or in connection with the tenancy, which are not expressly covered by a default provision.

Example of default fee provisions:

- The tenant is responsible for ensuring that they look after the key/s for the property throughout the tenancy. If they fail to do so, they will be responsible for covering the reasonable costs of replacement of the key/s;
- The tenant is responsible for paying their rent on time. If they fail to do so, interest will be charged in line with the Bank of England's base rate if a rent payment is more than 14 days overdue for each day the payment is outstanding.

e) payments on assignment, novation or variation of a tenancy when requested by the tenant capped at £50, or reasonable costs incurred if higher;

If the tenant requests a change to their tenancy agreement, for example a change of sharer, a landlord or agent is entitled to charge up to £50 for the administration involved in amending the tenancy agreement or the amount of their reasonable costs, if that is higher. Any charge above that amount is a prohibited payment. The general expectation is that this charge should not exceed £50. In any case, a landlord or agent should be able to demonstrate to the tenant that any fee charged above £50 is reasonable and provide evidence of their costs. Evidence could be provided through invoices or receipts.

Assignment is the process whereby a person, the assignor, transfers rights, obligations or benefits to another, the assignee, for example, where a new tenant takes the place of another in a flat share arrangement.

Novation is different from assignment, it involves the creation of a new contract and requiring consent of all parties.

Variation is the act of changing or adapting a contract.

f) payments associated with early termination of the tenancy, when requested by the tenant;

If a tenant requests to leave before the end of their tenancy a landlord or agent is entitled to charge an early termination fee, which must not exceed the loss they have suffered in permitting the tenant to leave early. This would usually mean that they must not charge any more than the rent they would have received before the

tenancy reaches its end. A landlord or agent should aim to agree to any reasonable request to terminate the tenancy agreement early and should charge no more than to cover any likely void period. A tenant could still be required to pay rent at specified intervals as determined by their tenancy agreement until a replacement tenant is found.

g) payments in respect of utilities, communication services and council tax;

Tenants remain responsible for paying their bills, which could include council tax, utility payments (e.g. gas, electricity, water), and communication services (e.g. broadband, television license, phone). Where all or some of these payments are included within the rent, as set out under the terms of a tenancy agreement, a tenant cannot be required to pay for these services separately (but would still be required to pay any bills not included in the rent).

The Act also amends other legislation:

Chapter 3 of Part 3 of the Consumer Rights Act 2015

Chapter 3 of Part 3 of the Consumer Rights Act 2015 requires an agent in England to display information about their relevant fees and membership of redress and client money protection schemes prominently in their office and on their website. The amendments are:

1. to apply those requirements in relation to third party websites (any portal on which a property to let is advertised, for example, Rightmove, Zoopla or Facebook),
2. to make new provision to allow a local weights and measures authority in England to impose more than one financial penalty in respect of a continuing breach of the requirement to publicise fees in England; and,
3. to require letting agents to give the name of their Client Money Protection scheme (not just whether they are a member of such a scheme, as this will become a mandatory requirement from April 2019).

Section 135 of the Housing and Planning Act 2016

The Act amends section 135 of the Housing and Planning Act 2016 to provide that the enforcement of Client Money Protection Schemes will be undertaken by local weights and measures authorities. The Government will issue separate guidance on client money protection. However, the changes made in the Act are summarised below:

Firstly, the Act clarified that money that has already been protected through a Government approved tenancy deposit scheme is not required to be doubly protected by a client money protection scheme.

Secondly, the Act will not require schemes to pay out where certain risks are excluded by insurers. These policy exclusions typically refer to events such as war, terrorism or confiscation of the state.

Thirdly, the Government are providing that the level of insurance held by schemes is proportionate to the risk of client money loss rather than requiring scheme providers to ensure they can provide cover for every penny held in an agent's client account.

Fourthly, the Government are specifying that client money protection schemes can allow limits per individual claimant and scheme aggregate limits that are at least equivalent to the scheme's maximum probable loss. Allowing schemes to set a limit per individual claimant ensures that they are not required to pay out without limit. It will ensure that more sophisticated large corporate landlords take responsibility for the control of client money held on their behalf. The Financial Services Compensation Scheme similarly have individual claim limits and we are seeking to replicate this accepted practice.

Finally, for a transitional period of 12 months after the requirement to belong to a client money protection scheme comes into force, the Government are permitting agents to join a scheme if they are making all efforts to apply for a client account but have not yet obtained one. This is to ensure that agents have sufficient time to find a bank that offers a pooled client account and provide the suitable reassurances and evidence to their scheme provider. Agents will need to demonstrate to their scheme all the steps that they have taken and work with schemes to find alternative banking providers if necessary. The twelve-month transitional period only applies in relation to applying for a pooled client account and not to the client money protection more broadly.

4.2 Penalties

A breach of the legislation will usually be a civil breach with a financial penalty of up to £5,000. However, if a further breach is committed within five years of the imposition of a financial penalty or conviction for a previous breach, this will be a criminal offence. Upon conviction, the penalty is an unlimited fine and a banning order offence under the Housing and Planning Act 2016.

Where an offence is committed, enforcement authorities may impose a financial penalty of up to £30,000 as an alternative to prosecution. In such a case, enforcement authorities will have discretion over whether to prosecute or impose a financial penalty. Where a financial penalty is imposed this does not amount to a criminal conviction.

A breach of the requirement to repay the holding deposit is a civil offence and will be subject to a financial penalty of up to £5,000.

Breach	**First Offence**	**Further breach within 5 years**
Charging unlawful fees	Civil breach – up to £5,000 fine	Criminal offence **but** financial penalties of up to £30,000 can be issued as an alternative to prosecution

		The criminal offence would be a banning order offence under section 14 of the Housing and Planning Act 2016.
Unlawfully retaining the holding deposit	Civil breach – up to £5,000 fine	Civil breach – financial penalty of up to £5,000 fine Not a banning order offence

Enforcement authorities will be able to retain the money raised through financial penalties with this money reserved for future housing enforcement in the private rented sector.

The process for enforcing the legislation is in section 6 of this guidance.

Each request for a prohibited payment is a breach. For example, the following would be considered multiple breaches:

- An agent/landlord charging different tenants under different tenancy agreements prohibited fees
- An agent/landlord charging one tenant multiple prohibited fees for different services at different times
- An agent/landlord charging one tenant multiple prohibited fees for different services at the same time
- An agent/landlord charging one tenant one total prohibited fee which is made up of different separate prohibited requirements to make a payment e.g. £200 requested for arranging the tenancy and doing a reference check would represent multiple breaches

Where an agent or landlord is being fined for multiple breaches at once and they have not previously been fined, the financial penalty for each of these breaches is limited to up to £5,000 each. Section 12(1)(c) provides that the period of five years (in which a second breach could occur) begins on the day on which the relevant penalty was imposed or the person was convicted. The date on which the penalty is imposed is the date specified in the final notice.

Further information on how to determine the appropriate sanction is in section 6 of this guidance.

5. The Lead Enforcement Authority

5.1 What is the lead enforcement authority?

In the Act, the lead enforcement authority is the Secretary of State, or a person whom the Secretary of State has arranged to be the lead enforcement authority in accordance with section 24, subsection (2).

The Secretary of State may make arrangements for a local weights and measures authority in England to be the lead enforcement authority for the purposes of the relevant letting agency legislation instead of the Secretary of State.

Relevant legislation is the Tenant Fees Act 2019, Chapter 3 of Part 3 of the Consumer Rights Act 2015 as it applies in relation to dwelling-houses in England, an order under section 83(1) or 84(1) of the Enterprise and Regulatory Reform Act 2013 and regulations under section 133, 134 or 135 of the Housing and Planning Act 2016.

5.2 What are the duties of the lead enforcement authority?

It is the duty of the lead enforcement authority to oversee the operation of the relevant letting agency legislation and to issue guidance to enforcement authorities about the exercise of their functions under this Act.

It is the duty of the lead enforcement authority to provide information and advice to relevant authorities and the public in England about the operation of the relevant legislation in a manner that it considers appropriate. For example, if a district council was aware of a breach but did not have the capacity to undertake enforcement action and was unclear about its duties or powers under the Act, the lead enforcement authority should be consulted to give clarification.

The lead enforcement authority may also disclose information to relevant authorities for the purposes of enabling that authority to determine whether there has been a breach of, or an offence under, the relevant legislation. For example, enforcement authorities may wish to know whether a landlord or agent has previously committed a breach in another region.

It is also the duty of the lead enforcement authority to keep under review and from time to time advise the Secretary of State about:

- Social and commercial developments in England and elsewhere relating to tenancies, the carrying on of letting agency work and related activities, and
- The operation of the relevant letting agency legislation. For example, to report the number of financial penalties levied for a breach of the ban.

5.3 Enforcement by the Lead Enforcement Authority

The lead enforcement authority can undertake its own enforcement action, either, where a breach is reported directly to the lead enforcement authority or where local weights and

measures authorities do not have the capacity to enforce and then refer the case to the lead enforcement authority.

If an enforcement authority is unable to take enforcement action they should ask the lead enforcement authority for guidance, in the first instance, and if all avenues have been explored, the lead enforcement authority may take steps to enforce the legislation themselves.

If such action is taken the lead enforcement authority may exercise the same powers as the relevant local authority and must notify that authority of their action. The latter is relieved of the duty to enforce the breach, but must assist the lead enforcement authority if required, for example, by providing information.

6. What is the procedure for enforcing the Act?

6.1 Evidence gathering

An enforcement authority must be satisfied beyond a reasonable doubt that a person has breached section 1 or 2 or Schedule 2 to impose a financial or criminal penalty. The burden of proof is such because a second or subsequent breach, within five years, is a criminal offence. It is up to enforcement authorities to assess whether they think they have met the criminal burden of proof, this decision stands unless challenged on appeal. Enforcement authorities may wish to safeguard their decision with a review panel for example, but this is at the discretion of the enforcement authority.

To prove an assertion, enforcement authorities should gather evidence. It is up to the discretion of the enforcement authority as to what sort of evidence to gather. However, enforcement authorities may wish to:

- identify who has committed the breach
- consult with its own records and with the lead enforcement authority to establish whether a sanction for a previous breach has been imposed
- check any relevant literature, such as a tenancy agreement or company website, or software such as 'hypercam' which captures computer screen activity and sound simultaneously allowing investigators to record their evidence gathering action with verbal annotation
- gather any recorded exchange between the parties, such as emails or text messages and bank statements
- software such as the 'wayback machine' which acts as an internet archive and can be used to check previous versions of a webpage, which may have since been altered
- secure the assistance of a criminal investigator
- conduct interviews under caution
- seek assistance from a financial intelligence officer to establish the transfer of money

Evidence gathering must be conducted in line with the Regulation of Investigatory Powers Act 2000[2].

Note: The Government's consumer guidance for the Tenant Fees Act 2019 encourages tenants, landlords and agents to retain relevant information that may be helpful as evidence.

6.2 Offences - Determine whether to prosecute or impose a financial penalty

Enforcement authorities must determine whether to seek a prosecution in the magistrates' court or to impose a financial penalty of up to £30,000 for landlords or agents who commit a further breach within five years of the imposition of a financial penalty or conviction for a

[2] https://www.gov.uk/government/collections/ripa-codes

previous breach. A financial penalty of up to £5,000 is imposed for a first breach of the Act (see 4.2 for further information).

Individuals convicted of an offence under the Act are liable to an unlimited fine set by the courts. Where a financial penalty of up to £30,000 is imposed as an alternative to prosecution this does not amount to a criminal conviction. The legislation does not permit enforcement authorities to impose a financial penalty of up to £30,000 and prosecute for the same offence. Similarly, if a financial penalty of up to £30,000 has been imposed, a person cannot be convicted of an offence for the same conduct.

In all instances when determining whether to prosecute or impose a financial penalty of up to £30,000, enforcement authorities must be fair, independent and objective. They must not let any personal views about ethnic or national origin, gender, disability, age, religion or belief, political view, sexual orientation of the parties involved influence their decisions. Neither must enforcement authorities be affected by improper or undue pressure from any source. Enforcement authorities must always act in the interest of justice and not solely for obtaining a conviction.

Enforcement authorities must apply the principles of the European Convention on Human Rights, in accordance with the Human Rights Act 1998, at each stage of a case.

Enforcement authorities are expected to develop and document their own policy on when to prosecute and when to issue a financial penalty of up to £30,000 and should decide which option they wish to pursue, on a case-by-case basis, in line with that policy.

Prosecution may be the most appropriate option where a breach is particularly serious or where the landlord or agent has committed similar breaches in the past. However, that does not mean financial penalties of up to £30,000 should not be used in cases where serious breaches have been committed. Enforcement authorities may decide that a significant financial penalty, rather than prosecution, is the most appropriate and effective sanction in that particular case.

Enforcement authorities should consider the following general principles when deciding whether to prosecute a landlord or agent:

a) there is sufficient admissible and reliable evidence that the offence has been committed and there is a realistic prospect of conviction; and

b) the enforcement authority believes that it is in the public interest to do so.

The enforcement authority's determination should be fair and proportionate reflecting the severity of the breach as well as taking into account the landlord's or agent's previous record of non-compliance.

Enforcement authorities may wish to consider the guidance *The Code for Crown prosecutors* by the Crown Prosecution Service.[3]

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[3] https://www.cps.gov.uk/publication/code-crown-prosecutors

The following factors may be considered when deciding whether to prosecute:

- history of non-compliance
- severity of the breach
- deliberate concealment of activity or evidence
- knowingly or recklessly supplying false or misleading evidence
- intent of the landlord/agent, individually and/or corporate body
- attitude of the landlord/agent
- deterrent effect of a prosecution on the landlord/agent and others
- extent of financial gain as result of the breach

A record of each decision and the reasons for determining whether to prosecute or impose a financial penalty of up to £30,000 must be made by the enforcement authority.

Enforcement authorities must consider their local housing authority's policy on whether to pursue a banning order under the Housing and Planning Act 2016 and should decide which option it wishes to pursue on a case-by-case basis in line with that policy. It is expected that a local housing authority will pursue a banning order for the most serious cases.

If the court makes a banning order, the local housing authority must make an entry in the database of rogue landlords and property agents under the Housing and Planning Act 2016. An entry may also be made if a person is convicted of a banning order offence committed at the time they are a residential landlord or property agent or if two financial penalties have been imposed on a person for such an offence in a 12-month period. Government has published statutory guidance regarding the database of rogue landlords and property agents.[4]

6.3 Determine the appropriate financial penalty

Enforcement authorities have discretion when determining the appropriate level of financial penalty within the limitations set out by the Act (see point 4.2 for further information).

Enforcement authorities are expected to develop and publish their own policy on determining the appropriate level of financial penalties to impose. Enforcement authorities are expected to consider each breach on a case by case basis and for the maximum amount to be reserved for the worst offenders.

The actual amount levied in any particular case should be fair and proportionate reflecting the severity of the breach as well as taking into account the landlord or agent's previous record of non-compliance.

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[4] https://www.gov.uk/government/publications/database-of-rogue-landlords-and-property-agents-under-the-housing-and-planning-act-2016

Enforcement authorities should consult with the lead enforcement authority to ensure their policies are in line with the national approach to promote consistency, alongside local priorities.

Enforcement authorities should consider the following factors to help ensure that the financial penalty is set at an appropriate level:

a) **Severity of the breach** - the more serious the breach, the higher the penalty should be.

   This should include considering:

   - the track record of the landlord or agent – a higher penalty will be appropriate where the landlord or agent has a history of failing to comply with their obligations and/or their actions were deliberate and/or they knew, or ought to have known, that they were in breach of their legal responsibilities. Agents and landlords are running a business and should be expected to be aware of their legal obligations; and

   - harm caused to the tenant - the greater the harm, the greater the amount should be when imposing a financial penalty.

b) **Punishment of the landlord or agent**. A financial penalty should not be regarded as an easy or lesser option compared to prosecution. While the penalty should be proportionate and reflect both the severity of the breach and previous track record of the offender, it is important that it is set at a high enough level to help ensure that it has a real economic impact on the landlord or agent and demonstrates the consequences of not complying with their legal obligations.

   This should include considering:

   - Deterring the landlord or agent from repeating the breach;
   - Deterring others from committing similar breaches; and
   - Remove any financial benefit the landlord or agent may have obtained because of committing the breach.

c) **Aggravating and mitigating factors**. In order to determine the financial penalty, the enforcement authority should consider whether there are any aggravating and/or mitigating factors in each case.

   Below is a non-exhaustive list of factors that enforcement authorities may wish to consider depending on the circumstances and local priorities:

   Aggravating factors include:

   - Previous convictions or record of non-compliance
   - Motivated by financial gain
   - Obstructive to the investigation
   - Deliberate concealment of the activity or evidence

- Tenant is a vulnerable individual

Mitigating factors include:

- Co-operation with the investigation
- Prompt repayment of prohibited charge to the tenant
- Evidence of health reasons preventing reasonable compliance (poor mental health, unforeseen health issues and/or emergency health concerns)
- No previous breaches
- Landlord or agent is a vulnerable individual, where vulnerability is linked to the breach being committed
- Good character / exemplary conduct
- Reduction for admission of guilt
- Whether landlord or agent's primary trade or income is connected with the private rented sector

d) **Fairness and proportionality**. The final determination of any financial penalty should be considered alongside the general principle that a penalty should be fair and proportionate but in all instances act as a deterrent and remove any gain as a result of the breach.

Factors to consider include:

- Totality principle. If issuing a financial penalty for more than one breach, or where the landlord or agent has already been issued with a penalty, consider whether the total financial penalties are just and proportionate to the breaches. Where the landlord or agent is issued with more than one financial penalty, the enforcement authority should consider the guidance 'Offences Taken into Consideration and Totality by the Sentencing Council for England and Wales'.[5]
- Impact of the financial penalty on the landlord or agent's ability to comply with the law and whether it is proportionate to their means (e.g. risk of loss of home)
- Impact of the financial penalty on third parties (e.g. employment of staff or other customers)

A record of each decision and the reason for determining the financial penalty must be made by the enforcement authority.

6.4 Issuing a financial penalty

Before imposing a financial penalty the enforcement authority must give the landlord or agent notice of their intention to do so ("notice of intent"). This notice must be given within

[5] https://www.sentencingcouncil.org.uk/wp-content/uploads/Definitive_guideline_TICs__totality_Final_web.pdf

a period of six months, beginning with the first day on which the authority has sufficient evidence that the person has breached the prohibitions in the Act. If the breach is a continuing breach, the notice must be given while the breach is continuing or within six months of the last day on which the breach occurred.

The notice of intent must set out the date on which the notice of the intent is served, the amount of the penalty, the reasons for imposing the penalty and information about the right to make representations.

A pro forma notice of intent is provided at Annex B of this guidance.

A person who is given a notice of intent has 28 days to make representations. After the end of the period for representations, the enforcement authority must decide whether or not to impose a financial penalty and if so, the amount of the penalty.

If the enforcement authority decides to impose a financial penalty, it must give the person a final notice imposing the penalty ("final notice"). The final notice must require payment of the penalty within 28 days and require repayment of the prohibited payment, holding deposit or amount paid under a prohibited contract within 7 – 14 days. The final notice must set out certain information, including the date on which the final notice is served, the amount of the penalty, the reasons for imposing it, how and when to pay, the rights of appeal and consequences of failing to comply with the notice.

A pro forma final notice is provided at Annex C of this guidance.

An enforcement authority may at any time withdraw a notice of intent or final notice. The authority may also reduce the amount specified in a notice of intent or a final notice or amend a notice to remove a requirement to repay a prohibited payment or holding deposit. The person who has received the notice must be notified in writing of any such withdrawal, reduction or amendment.

If a landlord or agent fails to pay all or part of a financial penalty, the enforcement authority may recover the outstanding amount on the order of the county court, as if it were payable under the order of that court.

Where an enforcement authority in England imposes a financial penalty, it may retain the proceeds of the penalty and use this money for the purposes of any of its enforcement functions in relation to the private rented sector. Any excess must be paid to the Secretary of State.

6.5 Offences by Officers of the Body Corporate

Clause 13 provides that if an offence is committed by a body corporate then an officer or member (where the body corporate is managed by its members) commits the offence and is liable to punishment for the offence as well as the body corporate. This is only the case if it is proved that the offence was committed with the approval or connivance of the officer or member or is attributable to that person's negligence.

6.6 Recovery of amount paid by enforcement authority

Section 10 of the Act enables an enforcement authority to require a person who has committed a breach to pay the tenant, or other relevant person, any outstanding prohibited payment or holding deposit. Similarly, if the landlord or agent required a relevant person to enter into a contract in breach of the Act, they may be required to repay the tenant. For example, where a landlord requires a tenant to pay for a third-party reference in connection with the tenancy, they will need to reimburse the tenant for any fees paid. A landlord or agent who has received an unlawful payment from a tenant must secure consent from the tenant (or relevant person) as to how that payment is refunded. For example, whether it is paid back directly or off-set against the rent or tenancy deposit.

Where an enforcement authority requires a landlord or letting agent to make a payment to a tenant or other relevant person under section 10, the enforcement authority may require the landlord or letting agent to pay interest.

Where an enforcement authority requires a landlord or agent to pay interest the amount carries interest from the date specified in section 11, subsection (3) until the date on which the amount is paid. The rate of interest is the rate for the time being specified in section 17 of the Judgments Act 1838.

6.7 Assistance to recover amount paid

Under section 15 of the Act a tenant or relevant person can apply to the First-tier Tribunal for money from the landlord or agent for payments they have been required to make because of a breach of the Act. A tenant or relevant person will only be able to recover their actual loss via the First-tier Tribunal and cannot seek added compensation from landlords or letting agents. An application cannot be made to the First-tier Tribunal for repayment if an enforcement authority has, in relation to the relevant breach, commenced criminal proceedings or required the landlord or agent in question to repay the relevant person.

Section 16 provides that an enforcement authority may help a tenant or other relevant person to make an application under section 15, for example by providing advice or by conducting proceedings.

An enforcement authority may help a tenant or relevant person in the event that the landlord or letting agent does not comply with the order of the First-tier Tribunal and needs to apply to the county court.

6.8 Duty to notify

There are certain circumstances in which an enforcement authority must notify another body of enforcement action. These circumstances are set out in section 14 of the Act.

These provisions are particularly important where an enforcement authority intends to act in respect of a breach that occurs outside of its local area. For example, where a landlord has multiple properties in different areas or if a breach has been committed by an agent

that operates nationally. The duty to notify will ensure that work is not duplicated and a record of previous enforcement action must be kept so that, if a future breach occurs, the relevant enforcement authority can check whether this is a first breach or not.

Where a local weights and measures authority proposes to take enforcement action outside of its local area, it must notify that area's local weights and measures authority of its intention to do so. When such a notification is received the latter is relieved of its duty. This duty is reinstated if the local weights and measures authority is informed that the enforcing local weights and measures authority has not taken the enforcement action proposed. The enforcing local weights and measures authority is required to notify the local weights and measures authority if they do not take enforcement action.

Where a district council proposes to take enforcement action in respect of a breach, it must notify the local weights and measures authority of its intention to do so. When such a notification is received the latter is relieved of its duty. This duty is reinstated if the local weights and measures authority is informed that the district council has not taken the enforcement action proposed. The enforcing district council is required to notify the local weights and measures authority if they do not take enforcement action.

An enforcement authority must notify the lead enforcement authority as soon as is reasonably practicable whenever it imposes a financial penalty. This is to ensure that when an enforcement authority becomes aware of a breach it is able to check whether a penalty has been issued previously by another authority. The enforcement authority must also notify the lead enforcement authority as soon as is reasonably practicable if it withdraws the financial penalty or it is quashed on appeal.

An enforcement authority must notify the local housing authority where a breach occurred if the local housing authority is not the enforcement authority who imposed the penalty and the final notice has not been withdrawn as soon as is reasonably practicable. This is the case if the period for bringing an appeal expires without an appeal being brought, or an appeal against the penalty is withdrawn, abandoned or the final notice imposing the penalty is confirmed or varied on appeal.

An enforcement authority who has brought proceedings must notify the local housing authority if the conduct in which the offence relates occurs in an area of a local housing authority that is not the enforcement authority that brought the proceedings *and the lead enforcement authority* where a person is convicted of an offence.

Section 26 sets out the requirements on when the lead enforcement authority is required to notify.

The lead enforcement authority must notify the relevant local enforcement authority when it proposes to take enforcement action in respect of a breach. In most instances this will be the local trading standards, on whom the duty to enforce rests. However, it could also be the local housing authority if they are involved in enforcement action. Section 26, subsection 8, also sets out that the lead enforcement authority is required to notify the local housing authority, in the area where the local housing authority is not the enforcement authority, when imposing a financial penalty. This is the case if the period for bringing an appeal expires without an appeal being brought, or an appeal against the

penalty is withdrawn, abandoned or the final notice imposing the penalty is confirmed or varied on appeal or when bringing proceedings against a person for an offence.

6.9 Discharging duties and interacting with other enforcement authorities

We encourage close working between district and county councils in non-unitary authorities to utilise each teams' areas of expertise and ensure effective enforcement.

Trading Standards teams have responsibilities in enforcing requirements on letting agents and existing consumer protection laws. Trading Standards have a broad remit and a number of investigatory skills and resources. District councils that are not trading standards authorities are likely to have strong local knowledge of their private rented sector, for example, a database of Houses in Multiple Occupation (HMO) and records of previous non-compliance with other private rented sector regulation such as harassment or unlawful eviction.

If district councils that become aware of a breach wish to enforce we would encourage teams to work with their local Trading Standards team to share information and make use of the resources and enforcement tools that trading standards have. For example, trading standards may be able to provide the support of a finance intelligence officer to track funds when gathering evidence.

Enforcement authorities may seek the guidance of the lead enforcement authority if they are unsure of the help at their disposal.

Where a landlord or agent is operating in multiple areas, it would be advisable to consult with enforcement authorities in the relevant areas where the landlord or agent operates to ascertain whether other authorities are taking action. Enforcement authorities may also seek guidance from the lead enforcement authority, who should be able to assist with more complex cases.

6.10 What is the effect of a breach of section 1 or 2 of the Act?

Section 4 of the Act provides that any term of a tenancy agreement or agreement between an agent and tenant that requires a tenant to make a prohibited payment is not binding on the tenant. The rest of the agreement will continue to apply.

Any prohibited loan made by the tenant is repayable on demand.

7. Appeals

7.1 Can a landlord or letting agent appeal a financial penalty?

Yes. There is a right to appeal to the First-tier Tribunal against a financial penalty. An appeal against a financial penalty must be brought within 28 days from the day after the final notice was served. A landlord or agent may appeal against the decision to impose a penalty or the amount of the penalty. An appeal is to be a re-hearing of the enforcement authority's decision and may take into account additional evidence of which the enforcement authority was unaware.

If a landlord or agent makes an appeal, the final notice is suspended in relation to the part of the notice which is the subject of the appeal until the appeal is determined or withdrawn.

On appeal, the First-tier Tribunal may confirm, vary or quash the final notice. The maximum amount that the First-tier Tribunal can impose is the same as the maximum amount that the enforcement authority could have imposed.

Note: In the First-tier Tribunal, under rule 14 of the Tribunal Procedure (First-tier Tribunal – Property Chamber), someone who is not legally qualified can represent a party to the proceedings. Enforcement authorities may wish to consider this when deciding whether or not to contract the services of a legal professional. A person can also choose to represent themselves.

7.2 Can a landlord or letting agent appeal a request to repay a prohibited payment, holding deposit or amount paid by a relevant person under a prohibited contract?

Yes. There is a right to appeal to the First-tier Tribunal against a requirement to repay a prohibited fee, holding deposit or amount paid by a relevant person under a prohibited contract. An appeal must be brought within 7-14 days from the day after the final notice was served. The length of time in which a landlord or agent has to make an appeal will depend on the amount of time the landlord or agent has been given to repay the prohibited fee. For example, if a landlord has been given seven days to repay a prohibited fee, they will have seven days to appeal this decision. An appeal is to be a re-hearing of the enforcement authority's decision and may take into account additional evidence of which the enforcement authority was unaware.

If a landlord or agent makes an appeal, the final notice is suspended in relation to the part of the notice which is the subject of the appeal until the appeal is determined or withdrawn. On appeal, the First-tier Tribunal may confirm, vary or quash the final notice.

7.3 Can a landlord or letting agent appeal a criminal offence?

Yes. Guidance on how to appeal a sentence or conviction is available on the Ministry of Justice website at: https://www.gov.uk/appeal-against-sentence-conviction.

7.4 Can a landlord or letting agent appeal a banning order?

Yes. Detail of appeals against banning orders is in section 8 of the banning order guidance[6].

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[6] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/697643/Banning_order_guidance.pdf

8. Publicity following a sanction

Enforcement authorities have discretion about publicising a successful penalty for a breach of the legislation.

For an initial breach of the ban, we would expect enforcement authorities to publicise the successful imposition of a financial penalty where this would have a beneficial effect on awareness of the legislation for the public. For example, where a tenant has successfully challenged a deliberate attempt by a landlord or agent to charge an unlawful fee.

For a repeated breach of the ban (i.e. where a breach is committed within five years of the imposition of a financial penalty or a previous breach) we would strongly encourage enforcement authorities to make public any successful convictions, banning orders or financial penalties issued either to individual landlords or letting agents. Enforcement authorities should consider how to publish such details at a local level.

Many local housing authorities already publicise successful prosecutions of rogue landlords through the local press. A local housing authority should take their own legal advice and consider their own local circumstances in determining whether to publicise, but we would encourage them to do so.

The Ministry of Justice has produced guidance that sets out the factors a local authority should consider when publicising sentencing outcomes.[7]

Enforcement authorities can and should disclose any criminal convictions against a landlord or agent on request by a tenant, where these are a matter of public record. We also encourage enforcement authorities to make information available on request by a tenant when enforcement authorities have successfully imposed a financial penalty against a landlords or letting agents. Before doing so enforcement authorities will need to consider their obligations under the Data Protection Act 2018.

Enforcement authorities must establish one of six valid lawful bases to process **personal data**. Each case will be different and the authority should decide which basis is appropriate for the case's circumstances. In the majority of cases under this Act, the lawful basis will be on the grounds of a **public task** when sharing a successful penalty by a landlord or letting agent. A public task may be relied upon when processing data in the exercise of official authority; this is the case when the enforcement authority is conducting a public function, power or performance of a specific task that is set out in law. Authorities do not need specific statutory power to process data, but the underlying task, function or power must have a clear basis in law. Authorities must be satisfied that processing is necessary for the performance of a task carried in the public interest or in the exercise of official authority vested in the controller.

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[7] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/487464/20150413-Publishing_Sentencing_Outcomes_MoJ_Guidance_HQMCSPA-O.pdf

Where the processing of personal data relates to a prosecution resulting from a second breach of the Act within five years of a successful conviction for a previous breach, enforcement authorities should give further consideration to the lawful basis of **criminal offence data**. Further information on the principles and your responsibilities on data protection is available on the Information Commissioner's Office at https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/ .

Enforcement authorities must be satisfied that their actions are compliant with the Data Protection Act 2018 when sharing personal data and should seek further advice where necessary. We encourage enforcement authorities to make decisions on publicising enforcement action in line with their data protection policy, if applicable.

Annex A – Glossary of Terms

Assured Shorthold Tenancy – As defined in Part 1 of the Housing Act 1988.

Applicable tenancy agreements – The Act applies to Assured Shorthold Tenancies ("ASTs"), student accommodation and licenses to occupy housing, in England only. Certain licences to occupy are excluded. See 'excluded licences' below.

Communication service – A service enabling any of the following to be used - a telephone other than a mobile phone, the internet, cable television, satellite television.

Commencement date – The date on which the ban on fees comes into force – 1 June 2019 for all new tenancies.

Enforcement authorities – A local weights and measures authority in England, a district council that is not a local weights and measures authority or the lead enforcement authority.

Excluded licence – An excluded licence is a licence to occupy housing which must be:

a) arranged between the licensee and licensor with the assistance or advice of a registered charity or Community Interest Company (usually a registered Homeshare organisation) in connection with the grant, renewal or continuation of the licence;

b) arranged in order to provide the licensor with companionship sometimes combined with care or assistance (but not financial assistance); and

c) no rent or other consideration is provided other than the companionship sometimes combined with care or assistance (but not financial assistance) by the licensor for the accommodation, but they may receive payments from the licensee in respect of council tax, a utility, a communication service or a television licence.

False or misleading information – Information is false or misleading where the difference between the information provided and the correct information is such a landlord can reasonably take this information (or the tenants conduct in providing it) into account in deciding to grant the tenancy. Further examples are given in section 4.1 of this guidance.

Financial penalty – under section 8 of the Act, an enforcement authority may impose a financial penalty.

Holding deposit – money paid by or on behalf of a tenant to a landlord or letting agent before the grant of a tenancy with the intention that it should be dealt with by the landlord or letting agent in accordance with Schedule 2.

Housing – a building, or part of a building, occupied or intended to be occupied as a dwelling.

Landlord – includes:

a) A person who proposes to be a landlord under a tenancy,
b) A person who has ceased to be a landlord under a tenancy,
c) A licensor under a licence to occupy housing,

d) A person who proposes to be a licensor under a licence to occupy housing, and
e) A person who has ceased to be a licensor under a licence to occupy housing.

Lead enforcement authority – the lead enforcement authority is the Secretary of State, or a person whom the Secretary of State has arranged to be the lead enforcement authority in accordance with section 22, subsection (2).

Letting agent work – means things done by a person in the course of a business in response to instructions received from

a) A landlord who is seeking to find another person to whom to let housing, or
b) A tenant who is seeking to find housing to rent.

A person is not a letting agent for the purposes of the Act if the person engages in letting agency work in the course of that person's employment under a contact of employment. A person who is an authorised person in relation to a reserved legal activity is not a letting agent when carrying out legal activity in response to instructions from a landlord or tenant who does not also instruct that person to do other things as listed under a) and b) above.

Licence to occupy housing –

a) Includes a licence which is granted to a licensee by a licensor who resides in the housing,
b) Does not include a licence to occupy social housing,
c) Does not include a licence to occupy housing for the purpose of a holiday.

Long lease – means:

a) A long lease for the purposes of Chapter 1 or Part 1 of the Leasehold Reform, Housing and Urban Development Act 1993, or
b) In the case of a shared ownership lease (within the meaning given by section 7(7) of that Act), this would be a lease within paragraph (a) if the tenant's total share (within the meaning given by that section) is 100%.

Pre-commencement tenancies – are either:

a) Tenancies entered into (signed) before 1 June 2019; and
b) Statutory periodic tenancies that arose during the year after 1 June 2019 until 1 June 2020.

Prohibited payment – has the meaning given by Section 3 and Schedule 1.

Relevant person – a tenant or a person acting on behalf of a tenant, or who has guaranteed the payment of rent by a tenant but does not include:

a) A local housing authority within the meaning of the Housing Act 1985 (see section 1 of that Act),

b) The Greater London Authority, or

c) A person acting on behalf of an authority within paragraph (a) or the Greater London Authority.

Social housing – as defined in Part 2 of the Housing and Regeneration Act 2008.

Tenancy – means

a) An assured shorthold tenancy other than a tenancy of social housing or a tenancy which is a long lease,

b) A tenancy which meets the conditions set out in paragraph 8 (lettings to students) of Schedule 1 to the Housing Act 1988, or

c) A licence to occupy housing.

Tenancy agreement – means an agreement granting a tenancy of housing to a tenant, this can be written or verbal.

Tenancy deposit – means money intended to be held by a landlord or otherwise as security for the performance of any obligations of a tenant, or the discharge of any liability of a tenant arising under or in connection with a tenancy.

Tenant – includes:

a) A person who proposes to be a tenant under a tenancy,

b) A person who has ceased to be a tenant under a tenancy,

c) A licensee under a licence to occupy housing,

d) A person who proposes to be a licensee under a licence to occupy housing, and

e) A person who has ceased to be a licensee under a licence to occupy housing.

Trading Standards – local weights and measures authorities in England.

Transitional period – the Act allows a transitional period of one year from the commencement date for tenancy agreements that were entered into before commencement of the Act and statutory periodic tenancies which arise after the commencement date on the coming to an end of a fixed term tenancy which was entered into before that date.

Utility – means electricity, gas or other fuel, water or sewerage.

Annex B – Notice of Intent Pro Forma

Enforcement Authority

Tenant Fees Act 2019
Section 8

Notice of Intent to Impose a Financial Penalty

To: **[Insert full name which identifies an individual or company at address below]**

Of: **[Address of person on whom the notice is to be served]**

Reference number: **[Case reference number]**

Date of service:

The [enforcement authority] (the "Authority"), **GIVE NOTICE** that the Authority is satisfied that on [**date**] your conduct amounted to a breach of the Tenant Fees Act 2019, namely:

[delete as appropriate one offence per notice relevant breach]

(a) section 1 (Prohibitions applying to landlords)

(b) section 2 (Prohibition applying to letting agents)

(c) schedule 2 (treatment of holding deposit)], in respect of:

[**Address of property**].

The amount of a financial penalty imposed is determined by the Authority but must not exceed £5,000 for a first breach.

If a further breach is committed within 5 years of the imposition of a financial penalty or conviction for a previous breach, the second or subsequent breaches will be a criminal offence. The penalty for a criminal offence is an unlimited fine.

Enforcement authorities may impose a financial penalty of up to £30,000 as an alternative prosecution. Where a financial penalty is imposed instead of a prosecution this does not amount a criminal conviction.

The Council hereby proposes to impose a financial penalty for the above offence of **[£].**

The reasons for proposing to impose a Financial Penalty are detailed in the 'Statement of Reasons' below which form part of this Notice.

You may make written representations to the Authority about the proposal to impose a financial penalty. Any representations must be made within a period of 28 days beginning with the day after that on which this Notice was served; i.e. by no later than [*plus 28 calendar days from date or service*]. Representations should be sent to the address below.

[Enforcement authority's address]

Note: Written representations will also be accepted by email to [email]. Please ensure you receive an acknowledgement of your email as if not we may not have received your representations.

After the end of the period for representations the Authority must decide whether to impose a financial penalty on you and if the Council decides to impose a financial penalty on you it must give you a final notice imposing that penalty.

Further information on the procedure of imposing civil penalties can be found:

- The notes to this notice of intent
- The Tenant Fees Act 2019
- The Ministry of Housing, Communities and Local Government's Tenant Fees Act 2019
- Statutory Guidance for Enforcement Authorities
- The Authority's Private Housing Enforcement Policy
- The Authority's Policy on deciding on a financial penalty amount

Enforcement Authority

Tenant Fees Act 2019
Section 8

Notice of Intent to Impose a Financial Penalty
Statement of Reasons

To: [**Insert full name which identifies an individual or company**]

Of: [**Address of person on whom the notice is to be served**]

Reference number: **[Case reference number]**

Date of service:

This statement forms part of the Notice served on [*date*] 201X to [*name*].

Having regard to: -

- The Tenant Fees Act 2019
- The Ministry of Housing, Communities and Local Government's Tenant Fees Act 2019
- Statutory Guidance for Enforcement Authorities
- The Authority's Private Housing Enforcement Policy
- The Authority's Policy on deciding on a financial penalty amount; and
- The Code for Crown Prosecutors

The Authority is of the opinion that this financial penalty is the most appropriate, proportionate and effective sanction because:

1. [*Enforcement Authority*] is of the opinion that [*name*] has committed a breach of *Prohibitions applying to landlords / letting agents under section 1 / section 2 / schedule 2 of the Tenant Fees Act 2019.*

2. The evidence of the offence is; *(example only)*

    a) *An assured shorthold tenancy agreement (the "tenancy agreement") was entered into by [landlord / agent] and [tenant(s)] on [date] in relation to the property [address].*

    b) *Provision 5.1. of the tenancy agreement required from the tenant a "non-refundable administration fee to the [landlord / agent] of amount equal to 40% plus VAT of one months' rent or £500, whichever is higher, prior to taking occupancy of the above mentioned property".*

    c) *On [date] pursuit to the tenancy agreement [tenant] paid the £500 to [landlord / agent] (the "payment").*

d) *Provision 5.1 of the tenancy agreement is prohibited by section [1 or 2] of the Tenant Fees Act 2019.*

e) *On [date] [enforcement authority] was informed of the landlord / agent's conduct in requiring the payment.*

f) *The enforcement authority has reviewed the following documentation in the course of its investigation:*

i. *The tenancy agreement*
ii. *Six letters between [tenant] and [landlord / agent] between [date] and [date]*
iii. *Letter from bank confirming payment of £500 from [tenant] to [landlord] on [date].*
iv. *Enforcement authority's case file against [landlord / agent] on [date], including final notice served on [date] to [landlord / agent] in respect of financial penalty imposed by [enforcement authority] for breach of section 1 of the Tenant Fees Act 2019.*

3. *On the above evidence the authority is satisfied the [landlord has committed a breach of the Tenant Fees Act 2019.*

4. *The authority has noted [landlord / agent] received a financial penalty for previous breach under the Tenant Fees Act 2019 and final notice was served [date].*

5. *The enforcement authority has decided to impose a civil penalty as an alternative to prosecution under section 8 of the Tenant Fees Act 2019.*

6. *In line with the Authority's enforcement policy for determining the appropriate financial penalty, the enforcement authority decided to impose a financial penalty for the amount [£]*

7. *The decision was made on [date] and confirmed by [senior / enforcement officer].*

Signature of officer: Date:

Further information in respect of this notice can be obtained from *[enforcement officer, enforcement authority and address]*

Notes on the Tenant Fees Act 2019

Section 8 *Financial penalties*

An enforcement authority must be satisfied beyond a reasonable doubt that a person has breached section 1 or 2 or Schedule 2 to impose a financial penalty.

A financial penalty of up to £30,000 can be imposed as an alternative to prosecution. The legislation does not permit enforcement authorities to impose a financial penalty of up to £30,000 and prosecution for the same offence.

An enforcement authority may not impose a financial penalty if the landlord or letting agent has already been convicted or acquitted of an offence in relation to the conduct or criminal proceedings for the offence have been commenced. An enforcement authority is also not allowed to impose a financial penalty if the landlord or agent failed to return the holding deposit because of incorrect information received about the tenant's right to rent status provided by the Secretary of State.

Where a financial penalty is imposed only one such penalty may be imposed in respect of the same breach and only one enforcement authority may impose a penalty for the same breach.

Enforcement authority may impose a penalty in respect of a breach that occurs outside of its local area.

Schedule 3 *Financial penalties*

Before imposing a financial penalty, the enforcement authority must give the landlord or agent notice of their intention to do so. This notice must be given within a period of 6 months, beginning with the first day on which the authority has evidence that the person has breached the prohibitions in sections 1 or 2 or schedule 2 or, if the breach is a continuing breach, while the breach is continuing or within 6 months of the last day on which the breach occurred. The notice of intent must set out the date on which the notice of intent is served, the amount of the penalty, the reasons for imposing the penalty and information the right to make representations.

A person who is given a notice of intent has 28 days to make representation to the enforcement authority. After the end of the period for representations, the enforcement authority must decide whether or not to impose a financial penalty and if so, the amount of the penalty.

If the enforcement authority decides to impose a financial penalty, it must give the person a final notice. The final notice must require payment of the penalty within 28 days if the authority has imposed a financial penalty.

If the enforcement authority decides to impose the repayment of a prohibited payment, holding deposit or an amount paid under a prohibited contract, the final notice must require repayment within 7 to 14 days.

The notice must set out certain information, including the date on which the final notice is served, the reasons for imposing the penalty, the rights of appeal and consequences of failing to comply with the notice.

There is a right to appeal to the First- tier Tribunal against a final notice. A landlord or agent may appeal against the decision to impose the penalty or the amount of the penalty. An appeal is to be a re-hearing of the enforcement authority's decision and may take into account additional evidence of which the enforcement authority was unaware.

An appeal must be brought within 28 days from the day after the final notice was served if appealing against a financial penalty. If appealing against an order to repay a prohibited payment, holding deposit or an amount paid under a prohibited contract, the landlord or agent must appeal within the period specified in the final notice as the period within which that payment, deposit or amount must be repaid this will be within 7 – 14 days.

If a landlord or agent makes an appeal, the part of the notice that is appealed is suspended until the appeal is determined or withdrawn. On appeal, the First-tier Tribunal may confirm, vary or quash the final notice. The maximum penalty that the First- tier can impose is the same as the maximum amount that the enforcement authority could have imposed.

If a landlord or agent fails to pay all or part of a financial penalty, the enforcement authority may recover the outstanding amount on the order of the county court, as if it were payable under an order of that court.

Annex C – Final Notice Pro Forma

FINAL NOTICE IMPOSING A FINANCIAL PENALTY

Tenant Fees Act 2019 Section 8 Financial Penalties

On [*date*] [*Enforcement Authority*] issued you with a notice of intent to impose a monetary penalty. We are now issuing you with a Final Notice imposing a penalty for the following reasons:

(a) You did not make representations or objections with in the time period specified in the notice of intent

(b) After considering your representations we have decided to [*confirm*] or [*vary*] the monetary penalty

FINAL NOTICE IMPOSING A FINANCIAL PENALTY	**Reference Number:** NR200/TJ04/ (**Insert Worksheet number here**)

1. NOTICE OF BREACH

NOTICE GIVEN TO [*name of responsible person/business*]–

OF [*address*] –

NOTICE GIVEN BY [*enforcement officer*] –

OF [*enforcement authority and address*]

I, an authorised officer of [enforcement authority], is satisfied that you have committed a breach of [section 1 or 2 or Schedule 2] of the Tenant Fees Act 2019, through

Requiring a payment of a prohibited fee from a tenant/person guarantying a payment of rent/ or person acting on behalf of a tenant in connection with a tenancy under the Tenant Fees Act 2019.

Date of breach …….

Details of breach: [officer to summarise event and if relevant referring to results of any review]

……

……

……

……

……

……

……

Signature of authorised officer …….

Date of Final Notice: ……

I acknowledge receipt of the Final Notice

Signature and name of receiver: ……

This notice requires that you carry out one of the following actions.

A. Pay the penalty charge of £ [xx] within 28 days beginning with the day after this Final Notice was served and repay the prohibited payment/holding deposit/ amount paid

under a prohibited contract [delete as appropriate] of £xx within 7-14 [number of days to be selected] beginning with the day after this Final Notice was served or

B. Appeal to a First Tier Tribunal within 28 days against a financial penalty or within xx days [as above] against the requirement to repay a prohibited payment/holding deposit/ amount paid under a prohibited contract [delete as appropriate]

2. HOW THE TENANT MAY BE PAID

You should repay the full amount of prohibited payment/holding deposit/amount paid under a prohibited contract [delete as appropriate] of [insert amount]. You must make this payment to [name of tenant or relevant person] within the period of [insert period] days [number of days to be selected] and provide evidence that such a payment has been made to [Enforcement Authority] at [include address].

3. HOW THE PENALTY CHARGE MAY BE PAID

To be paid to: [Enforcement Authority]. **Please quote the Notice reference number as above when making payment.**

Address:

Methods of payment:

By Post:

By phone:

3. APPEALING THIS NOTICE

You may either pay or appeal to a First Tier Tribunal:

- within the period of 28 days from the day after the date of this final notice for a financial penalty or
- within the period of [insert number of days as entered above] days from the day after the date of this final notice for the requirement to repay to repay a prohibited payment/holding deposit/ amount paid under a prohibited contract [delete as appropriate].

The Tribunal will consider any representations you make and the circumstances of the alleged breach and will decide whether to confirm, vary or quash this notice.

You may appeal against:

(a) The requirement to repay the tenant or relevant person the full amount of prohibited payment/holding deposit/amount paid under a contract [delete as appropriate]

(b) The decision to impose the penalty;

(c) The amount of the penalty.

An appeal to the First Tier Tribunal is a re-hearing of the authority's decision but may be determined having regard to matters of which the authority was unaware.

The final notice or part that is appealed will be suspended until the appeal is finally determined or withdrawn. This means we cannot pursue you for payment until the appeal has been heard and decided.

Appeals will be heard by the First Tier Tribunal in the Property Chamber.

4. IF YOU DO NOT PAY THE PENALTY CHARGE, REPAY A PROHIBITED PAYMENT/HOLDING DEPOSIT/ AMOUNT PAID UNDER A CONTRACT OR YOU DO NOT PAY IT FOLLOWING AN UNSUCCESSFUL APPEAL

Unless we withdraw this notice, or a tribunal quashes it, or you have already paid the monetary penalty

required or repaid the tenant or relevant person any prohibited payment/holding deposit/amount paid under a prohibited contract [delete as appropriate], we will seek a Court Order from the County Court.

These proceedings cannot be started any earlier than:

(a) the end of the period allowed for the payment of the monetary penalty; or

(b) where you appeal to a First Tier Tribunal, before the day on which the appeal is either withdrawn or determined

Notes on the Tenant Fees Act 2019

Section 8 *Financial penalties*

An enforcement authority must be satisfied beyond a reasonable doubt that a person has breached section 1 or 2 or Schedule 2 to impose a financial penalty.

A financial penalty of up to £30,000 can be imposed as an alternative to prosecution. The legislation does not permit enforcement authorities to impose a financial penalty of up to £30,000 and prosecution for the same offence.

An enforcement authority may not impose a financial penalty if the landlord or letting agent has already been convicted or acquitted of an offence in relation to the conduct or criminal proceedings for offence have been commenced. An enforcement authority is also not allowed to impose a financial penalty if the landlord or agent failed to return the holding deposit because of incorrect information received about the tenant's right to rent status provided by the Secretary of State.

Where a financial penalty is imposed only one such penalty may be imposed in respect of the same breach and only one enforcement authority may impose a penalty for the same breach.

Enforcement authority may impose a penalty in respect of a breach that occurs outside of its local area.

Schedule 3 *Financial penalties*

Before imposing a financial penalty, the enforcement authority must give the landlord or agent notice of their intention to do so. This notice must be given within a period of 6 months, beginning with the first day on which the authority has evidence that the person has breached the prohibitions in sections 1 or 2 or schedule 2 or, if the breach is a continuing breach, while the breach is continuing or within 6 months of the last day on which the breach occurred. The notice of intent must set out the date on which the notice of intent is served, the amount of the penalty, the reasons for imposing the penalty and information the right to make representations.

A person who is given a notice of intent has 28 days to make representation to the local authority. After the end of the period for representations, the enforcement authority must decide whether or not to impose a financial penalty and if so, the amount of the penalty.

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If the enforcement authority decides to impose the repayment of a prohibited payment, holding deposit or an amount paid under a prohibited contract, the final notice must require repayment within 7 to 14 days.

The notice must set out certain information, including the date on which the final notice is served, the reasons for the penalty, the rights of appeal and consequences of failing to comply with the notice.

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An appeal must be brought within 28 days from the day after the final notice was served if appealing against a financial penalty. If appealing against an order to repay a prohibited payment, holding deposit or an amount paid under a prohibited contract, the landlord or agent must appeal within the period specified in the final notice as the period within which that payment, deposit or amount must be repaid this will be within 7 – 14 days.

If a landlord or agent makes an appeal, the part of the final notice which is the subject of the appeal is suspended until the appeal is determined or withdrawn. On appeal, the First-tier Tribunal may confirm, vary or quash the final notice. The maximum penalty that the First- tier can impose is the same as the maximum amount that the enforcement authority could have imposed.

If a landlord or agent fails to pay all or part of a financial penalty, the enforcement authority may recover the outstanding amount on the order of the county court, as if it were payable under an order of that court.