



Government publishes draft Responsible Actors Scheme Regulations – we consider who, how and why

Sections 126 to 129 of the Building Safety Act provided the legislative skeleton for ‘building industry schemes’ to secure the safety of people in or around buildings, or improve the safety of buildings, including by ensuring that actors in the building industry remedy defects or contribute to remediation costs.

Such schemes are backed up by the sanction of prohibiting development by those who decline to join. On 25 April 2023, the Government laid draft Regulations adding flesh to the bones by providing the details of the first scheme, the Responsible Actors Scheme (“RAS”). This article considers (i) **who** the RAS is targeted at, (ii) **how** members will be required to demonstrate that they are “Responsible Actors” – what members of the RAS are agreeing to; and (iii) **why** eligible members might consider joining – the detail on the prohibitions that may apply.

The focus of the RAS is on seeing construction industry participants with a significant level of profit agree to a binding legal contract to carry out remedial works or contribute to remedial costs, to cure fire safety defects in buildings of 11 metres or more in height. It takes the Government’s Developer Remediation Contract and puts it on a wider, more systematic footing, backed by sanction.

The draft Regulations are subject to a Parliamentary approval process, so they may change before they come into force, which the Government expects will be in the summer of 2023.

Who is eligible

There are three classes of eligibility for membership of the RAS:

1. Residential property developers: a party who is a residential property developer responsible for the development or refurbishment of ‘relevant buildings’ (residential buildings 11m or more in height, and developed or refurbished between April 1992 and April

2022) and who meets the profit condition;

2. Those responsible for developing certain buildings: a party responsible for at least two buildings eligible for funding from one of the Government’s schemes (ACM Cladding Remediation Fund or Building Safety Fund), and who meets the profit condition;
3. Voluntary participants: a person who has been responsible for developing or refurbishing a relevant building which would require remediation under the Self Remediation Terms (described below under ‘how’ below) and wishes to join the RAS.

Briefly put, the “**profit condition**” means having profits of £10 million per year in the years 2017, 2018 and 2019. The draft Regulations contain a detailed methodology for assessing whether a party meets the profit condition of either “average adjusted profits for the specified period” (financial years ending 2017, 2018 and 2019) greater than or equal to £10m per year. The RAS is therefore targeted only at construction industry participants of a certain significant scale; it also excludes any party with a very large turnover but which achieved average profits of less than £10m in the three relevant financial years.

It is important to note that the Government has decided to exclude all registered providers of social housing (“RPs”) and their wholly-owned subsidiaries from all of these categories. RPs cannot join the RAS. Buildings owned by RPs will still qualify as relevant buildings for the purpose of making other parties – e.g. private developers – eligible to join the RAS.

The Regulations detail a process of invitation by the Government and of application by eligible members, which requires immediate entry into a Self Remediation Contract (see ‘how’ below).

The Regulations contain an anti-avoidance provision which allows the Government to disregard any steps for which

one of the main purposes was avoiding that party being eligible for the RAS. This includes provision dealing with winding-up of a company to avoid eligibility. The Secretary of State can direct that another group company is to be deemed eligible in such circumstances.

How to be a “Responsible Actor” – conditions of the RAS

The principal condition of membership in the RAS is that the member enters into a Self Remediation Contract, applying the Self Remediation Terms, i.e. the terms of the developer remediation contract which the Government has already entered into with 46 of the largest developers.

The draft Regulations summarise the main obligations on each member, supplementing those within the developer remediation contracts themselves:-

1. Identifying buildings for which the member is responsible which require fire safety defect remediation;
2. Undertake or pay for works to remediate or fully mitigate any fire safety defects in their own buildings where required by the Self Remediation Terms;
3. Accept such responsibility for other buildings under the Self Remediation Terms;
4. Reimburse the Government for the Government’s remediation funding in respect of such buildings; and
5. Not undertake or procure others to undertake restructuring (i.e. as a business or company) to mean that the member is unable to fulfil its obligations under the Self Remediation Terms except where permitted under those terms.

The developer remediation contract is focused on ensuring remediation of “life critical fire safety risks” in buildings which are deemed to include any risk assessed as not tolerable under any Fire Safety Assessment or Fire Risk Appraisal of External Walls carried out in accordance with PAS 9980.

The Government will maintain a published list of members of the RAS, and if a member fails in its obligations regarding self-remediation or provision of information, the Government may revoke its membership.

Non-membership – whether by failure to join on invitation or revocation of membership – can lead to prohibitions on development (see ‘why’ below).

Why eligible members should join – prohibitions on development

Part 3 of the draft Regulations sets out the prohibitions

placed on developers who are eligible for membership of the RAS but either do not sign up for the scheme, or do not comply with the scheme’s conditions. The draft Regulations are equally applicable to persons under the control of the prohibited developer. This ensures that a developer subject to the prohibitions cannot circumvent the RAS by developing through other entities which they control (whether Special Purpose Vehicles or other group companies).

There are two main prohibitions which elaborate on the framework in ss128 and 129 of the Building Safety Act. These are categorised as follows:

1. Prohibiting the party from carrying out major development (the planning prohibition); and
2. Prohibiting the party from gaining building control sign-off (the building control prohibitions).

The planning prohibition prevents developers from carrying out major development of land in England. It requires developers subject to this prohibition to notify the relevant local planning authority that they fall within the prohibition when applying for planning permission relating to major development or when they acquire or dispose of an interest in land which has the benefit of planning permission. The nature of the planning prohibition builds on the existing planning system – the draft regulations adopt the definition of ‘major development’ which is found in Regulation 2 of the Town and Country Planning (Development Management Procedure) (England) Order 2015: this includes any development providing 10 or more dwellinghouses or a building or buildings with floor space greater than or equal to 1000 square metres. Local authorities’ existing powers to stop unlawful development are expanded to enforce this prohibition.

The building control prohibitions ensure that any application made by a prohibited person for building control approval will not be accepted by Local Authority Building Control Inspectors. The draft Regulations list out various documents which are not to be given by, or given to, developers subject to the prohibition and any document that is given in contravention of the prohibition is not to be treated as validly given – for example, an initial notice or an application for a completion certificate. Additionally, any action taken in relation to these documents are not to be treated as validly taken.

There are a number of exceptions to the prohibitions available. These include the following:

1. Businesses under the control of an eligible person who are not in the building industry;
2. Exceptions for projects necessary for critical national infrastructure;
3. Allowing building control sign-off for residential

buildings where people have exchanged contracts on their new home before the prohibition on their developer went into effect;

4. Permitting purchaser and owners to obtain a regularisation certificate for unauthorised building work under the Building Regulations 2010;
5. Permitting emergency repairs; and
6. Permitting building works in occupied buildings to ensure resident safety.

Notwithstanding these limited exceptions, the effect of these prohibitions on any party which intends to develop land is that it would be almost entirely prevented from doing so.

Conclusion

The RAS represents a significant development and systematisation of the Government's efforts to ensure remediation of high- and medium-rise residential buildings with life-critical fire safety defects by those responsible for their development.

While these Regulations are only in draft, those involved with such developments should take specific legal advice and consider whether they ought to consider their own eligibility to join the RAS according to these drafts. The RAS has a potentially huge impact on some developers not targeted by the original Developer Remediation Contract. The Government's own Impact Assessment published with the draft Regulations indicates one estimate of delay costs of 3-month prohibitions on eligible developers to total £117m. The Government note that developers subject to prohibitions would experience "severe cash-flow difficulties". The Government suggests that there may need to be a market reassessment of the burden of self-remediation which the market may not have "priced in" yet.

The choice presented by the Government to eligible parties seems stark: take responsibility within the scope of the RAS and continue to trade, or face a real prospect of being required to radically change your business or exit the market entirely, noting that the anti-avoidance provisions mean that even winding-up a developer may not spare its group.

For more information about this matter and related issues, please contact Mark London, Partner, William O'Brien, Solicitor, or Alicia Ogborn, Trainee Solicitor, Construction Engineering & Procurement, Devonshires.



Mark London

Partner

020 7880 4271

mark.london@devonshires.co.uk



William O'Brien

Solicitor

020 7880 4269

william.obrien@devonshires.co.uk



Alicia Ogborn

Trainee Solicitor

020 7880 4217

alicia.ogborn@devonshires.co.uk

Devonshires has taken all reasonable precautions to ensure that information contained in this document is materially accurate however this document is not intended to be legally comprehensive and therefore no action should be taken on matters covered in this document without taking full legal advice.