



# Tenancy Deposit Scheme



## Guidance for dealing with non-Assured Shorthold Tenancies and the Increased Rent Threshold



## Summary

1. The upper limit on ASTs in England was raised from a rent of £25,000 per annum to £100,000 with effect from 1 October 2010.
2. From 1 December 2011, the same increase takes effect in Wales.
3. To comply with the tenancy deposit protection provisions of the Housing Act 2004, the tenancies affected need to be registered with TDS or another approved tenancy deposit protection scheme (see paragraphs 9-12 below). To minimise the prospect of legal action for late registration, [The Department for] Communities & Local Government (CLG) recommended that it is good practice for members to register such deposits with TDS by 1 October 2010, or 1 December 2011, as appropriate. Any new ASTs with an annual rent up to £100,000 which commence on or after 1 October 2010 in England, or 01 December 2011 in Wales, must be protected in the same way (paragraphs 13-20).
4. Referring to the increased rent threshold in England, CLG previously expressed the opinion that *"Landlords with existing common law tenancies which will become assured shorthold tenancies when the rental threshold is increased, will not need to protect their tenants' deposits in a recognised scheme immediately, although we would recommend that it is good practice to do so. They will, however, need to protect the deposit if the tenancy is renewed on or after 1 October, or if a new deposit is taken."*

***[The Department for] Communities & Local Government (CLG) goes on to state that ultimately it is for the courts to decide when deposits should be protected and that they are unable to give a definitive interpretation of the legislation or speculate on how the courts might find in any particular case. Members may interpret the position differently but our guidance is based on what we currently consider the position to be, taking account of the 'best practice' opinions expressed by CLG. Accordingly we recommend that all new and existing AST's – in England and Wales - are protected in the same way.***

These tenancies will be included in the calculation of membership subscriptions, in the usual way, from April 2011.

5. TDS does not protect deposits of non-ASTs. Our insurers are not willing to provide the necessary cover. However, TDS will still be able to resolve any disputes over the allocation of these deposits by agreement (paragraphs 21-25).



We have revised our **Prescribed Information and Clauses for inclusion in Terms of Business, Assured Shorthold Tenancies (ASTs) and non-Assured Shorthold Tenancies (non-ASTs)** to take account of the changes in the treatment of non-ASTs after 1 October 2010 in England and 1 December 2011 in Wales. The new documentation must be used for all new non-ASTs starting after those dates. For simplicity no changes have been made to the Prescribed Information and Clauses to be inserted into tenancy agreements relating to ASTs.

6. TDS will continue to offer a service to resolve disputes arising from existing tenancies which contain TDSRA clauses in their tenancy agreements and terms of business.
7. The purpose of this guidance is to:
  - Summarise the change in the legislation
  - Explain how TDS will now deal with non-ASTs
  - Set out what this means for members and what they need to do regarding their non-ASTs.

## How has the legislation on non-ASTs changed?

9. The Housing Act 2004 only specifies that deposits for ASTs must be protected by an approved scheme. Deposits on other forms of tenancy do not require statutory protection.
10. Schedule 1 of the Housing Act 1988 defines "Tenancies which cannot be assured tenancies". These include tenancies:

*... under which the rent payable for the time being is payable at a rate exceeding £25,000 a year.*
11. Statutory Instrument 2010 no. 908 raised this ceiling to £100,000 in England. For practical purposes this will apply to all existing tenancies other than those specifically excluded by Schedule 1 e.g. company lets, agricultural tenancies, licences, etc.
12. Statutory Instrument 2011 no. 1409 will raise this ceiling to £100,000 in Wales. For practical purposes this will apply to all existing tenancies other than those specifically excluded by Schedule 1 e.g. company lets, agricultural tenancies, licences, etc.

There are no changes to other definitions in Schedule 1. **The Statutory Instruments extend to England and Wales only.**



## What is the effect on deposit protection?

13. The change brings more tenancies into the requirements of the tenancy deposit protection provisions of the Housing Act 2004. Members need to comply with TDS' initial requirements (or those of another approved tenancy deposit protection scheme) following the change taking effect on 1 October 2010 in England and 1 December 2011 in Wales.
14. It has never been compulsory for the deposits of non-ASTs to be protected, nor is it now. However, TDS will continue to offer voluntary dispute resolution for these deposits.

## What will Members have to do?

### Existing non-ASTs where the rent is between £25,000 and £100,000 per year

15. This concerns **existing** non-ASTs which:
  - became ASTs on 1 October 2010 in England and 1 December 2011 in Wales;
  - continue beyond 1 October 2010 in England and 1 December 2011 in Wales; and
  - are to be protected by TDS rather than another TDP scheme.
16. Members must have registered these tenancies on the TDS tenancy database no later than 1 October 2010 for tenancies in England and 1 December 2011 for tenancies in Wales.

However, members need not wait until the law changes to do this. Timely registration will minimise the prospect of a successful challenge on the grounds that the tenancies have not been registered within the 14 days required. A change will be made to the TDS tenancy database to include an additional field to record **monthly** rent (the database will calculate the annual equivalent). TDS recognises that this will have consequences for members and their use of third party software; and an IT FAQ was circulated to members following the increased rent threshold in England to ensure that members are able to upload tenancies in bulk in the future. However, ultimately, it will be for members to ensure that their third party software providers are able to accommodate the new field.

17. Members will need to provide a new tenancy agreement, or an addendum to the existing tenancy agreement, which explains the tenancy's new status and when it will take effect.



18. Members will also need to give landlords a similar addendum to their terms of business. Relevant sections from the Prescribed Information and Clauses for inclusion in Terms of Business, Assured Shorthold Tenancies (ASTs) and non-Assured Shorthold Tenancies (non-ASTs) will need to be included in the addenda.
19. By registering the tenancies on the TDS tenancy database, members acknowledge that they have complied with paragraph 18 above, and the Scheme's initial requirements (see Section 8 of **Tenancy Deposit Scheme: Rules of Membership**).

## New ASTs in England or Wales where the rent is between £25,000 and £100,000 per year

20. Any new tenancies with an annual rent between these limits, which commence on or after 1 October 2010 in England and 1 December 2011 in Wales, must be protected in the same way as other ASTs.

## Other new and existing tenancies which will continue to be non-ASTs

21. This includes tenancies:
- where the rent is between £25,000 and £100,000 per year which will not become ASTs e.g. company lets, agricultural tenancies, licences, etc.;
  - in Scotland and Northern Ireland;
  - or where the rent is over £100,000 per year.
22. These deposits cannot be protected by TDS, and must **not** be registered on the tenancy database.
23. TDS will continue to offer a service to resolve disputes arising from existing tenancies which contain TDSRA clauses in their tenancy agreements and terms of business, provided the tenancy agreement started before 1 October 2010 in England and 1 December 2011 in Wales.

## What has happened to the Tenancy Deposit Scheme for Regulated Agents (TDSRA)?

24. TDSRA ceased to operate from 1 October 2010. We consider it more appropriate to focus our resources on the resolution of disputes that fall under TDP legislation. However, for the benefit of our Members and the PRS



(Private Rented Sector) industry as a whole, we will consider disputes that no other Scheme accepts, providing the issues specified in paragraph 25 have been satisfied.

25. The Independent Case Examiner (ICE) may agree to resolve any disputes over the allocation of these deposits, by agreement. If he does:
- The ICE will propose what he considers the most effective method of resolving the dispute;
  - The tenancy agreement must contain the relevant clauses contained in **Prescribed Information and Clauses for inclusion in Terms of Business, Assured Shorthold Tenancies (ASTs) and non-Assured Shorthold Tenancies (non-ASTs)** relating to non-ASTs
  - Landlord, tenant and agent must consent in writing to his proposal;
  - Disputes will be subject to a fee of £500 + VAT, or 10% of the deposit + VAT, whichever is the greater;
  - The resolution process will not start until the parties' consent, the disputed amount and the fee have been received.

## Will the documentation change?

26. We have taken this opportunity to revise the **Prescribed Information and Clauses for inclusion in Terms of Business, Assured Shorthold Tenancies (ASTs) and non-Assured Shorthold Tenancies (non-ASTs)** relating to the operation of TDS. Please note that:
- **These changes only affect tenancies that will continue to be non-ASTs beyond 1 October 2010 in England and 1 December 2011 in Wales.**
  - **For simplicity no changes have been made to the Prescribed Information and Clauses to be inserted into tenancy agreements relating to ASTs.**
27. Members will also need to modify their Terms of Business. The revised clauses are in **Section C of Prescribed Information and Clauses for inclusion in Terms of Business, Assured Shorthold Tenancies (ASTs) and non-Assured Shorthold Tenancies (non-ASTs)**.
28. The new documentation must be used for all new non-ASTs starting on/after 1 October 2010 in England and 1 December 2011 in Wales.



## Where can I get further information?

29. This guidance note, and the

- [Tenancy Deposit Scheme: Rules of Membership](#)
- [Operational Procedures and Advice for members](#)
- [Prescribed Information and Clauses for inclusion in Terms of Business, Assured Shorthold Tenancies \(ASTs\) and non-Assured Shorthold Tenancies \(non-ASTs\)](#)

are available to members from the TDS website.

30. As noted above, the effects of the change in the legislation are yet to be tested in the Courts. TDS will continue to monitor the situation and update members with further information as it becomes available.



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