



Guidance on Enforcement of the Single Use Carrier Bags Charge (Wales) Regulations 2010

May 2012

Contact

Welsh Local Government Association

The WLGA's primary purposes are to promote a better local government, its reputation and to support authorities in the development of policies and priorities which will improve public service and democracy. It represents the 22 local authorities in Wales, with the 4 police authorities, 3 fire and rescue authorities and 3 national park authorities as associate members.

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Preface

This guidance is aimed at those businesses who:

- sell goods from a place in Wales, or sell goods that are delivered to persons in Wales;
- where those goods are supplied in one or more carrier bags that are not intended for multiple reuse.

The guidance sets out the enforcement approach of [XXX] Council in using the civil sanctioning powers available to it under the Single Use Carrier Bags Charge (Wales) Regulations 2010, which can be used when businesses do not meet certain legal requirements (e.g. to charge for single use carrier bags, to keep and retain records of the number of bags supplied, and to supply and publish those records).

Introduction

This guidance has been produced in order to provide greater clarity and assurance to businesses about how the new civil sanctioning powers available to local authorities under the Single Use Carrier Bag Charge (Wales) Regulations 2010 will be enforced by [XXX] Council (the Council), and how it will administer any non-compliance penalties or enforcement costs recovery¹. The Council is required to have regard to this guidance when exercising its functions under the Single Use Carrier Bag Charge (Wales) Regulations 2010. This guidance should be read in conjunction with the Compliance and Enforcement Policy of the Council².

The guidance does not explain the Single Use Carrier Bags Charge (Wales) Regulations 2010, but rather how the Council will enforce the powers within them. For further information on the background to and content of the Single Use Carrier Bag Charge (Wales) Regulations 2010, please refer to the guidance that was published by the Welsh Government in September 2011 (Welsh Government Guidance)³.

¹ As required by Regulations 22 and 23 of the Single Use Carrier Bag Charge (Wales) Regulations 2010

² [Link to local authority compliance and enforcement policy to be inserted here]

³ Guidance on the Single Use Carrier Bag Charge (Wales) Regulations 2010: WG13644 – ISBN 978 0 7504 6687 5

The Requirements

The Single Use Carrier Bag Charge (Wales) Regulations 2010 (referred to in this guidance as the 'SUCBCRs') were introduced by the Welsh Government (the Government) and came into force on 1 October 2011. Single use carrier bags can no longer be given away for free when people buy goods from a seller (being a person who in the course of trade or business sells goods from a place in Wales or sells goods which are delivered to persons in Wales). Some single use carrier bags are exempt from the requirement to charge. The minimum charge to the customer for each single use carrier bag is 5p and the charge applies to sales in-store and distance selling.

The SUCBCRs also require sellers who employ ten or more FTE members of staff to keep annual records of information relating to the single use carrier bags that they supply and in relation to the proceeds that they receive by way of the amount they charge for these bags.

Civil sanctions

The SUCBCRs grant enforcement powers to all local authorities in Wales enabling them to impose penalties known as civil sanctions on businesses that breach any of the requirements within the SUCBCRs. Full details of these requirements are included at Annex B and further information can also be found within Section 4 and 5 of the Welsh Government Guidance. Civil sanctions may also be imposed on a seller who, without reasonable cause, gives false or misleading information to a local authority officer, or otherwise obstructs or fails to assist a local authority officer in the conduct of their functions under the SUCBCRs⁴.

The civil sanctions available to the Council under the SUCBCRs are:

- Fixed Monetary Penalties (FMPs), which are explained at paragraphs 9-11;
- Variable Monetary Penalties (VMPs), which are explained at paragraphs 12-18; and,
- Compliance Notices, which are explained at paragraphs 12-18.

Fixed Monetary Penalty (FMP)

A fixed monetary penalty (FMP) is a relatively low level fixed sum that the Council can impose as a penalty in relation to the following breaches of the SUCBCRs, where the failure arises as a result of a seller failing to take all reasonable steps to enable it to do so:

- failing to charge
- failing to keep, retain, supply and publish records

An FMP cannot be used in conjunction with any other sanction. Once an FMP has been imposed, no other formal enforcement proceedings can be commenced against the seller for the same breach (other than to recover any penalty that remains unpaid).

FMPs cannot be imposed for giving false or misleading information to the Council or otherwise obstructing or failing to assist the Council without reasonable cause.

⁴ SUCBCRs Reg 11(3)

The amount that can be imposed as an FMP is as follows:

Breach	Fixed penalty amount
Failing to charge as a result of failing to take all reasonable steps to enable it to do so (Regulation 6)	£200
Failing to keep records as a result of failing to take all reasonable steps to enable it to do so (Regulation 8)	£100
Failing to retain records as a result of failing to take all reasonable steps to enable it to do so (Regulation 8)	£100
Failing to supply records as a result of failing to take all reasonable steps to enable it to do so (Regulation 9)	£100
Failing to publish records as a result of failing to take all reasonable steps to enable it to do so (Regulation 10)	£100

Discretionary Requirements: Variable Monetary Penalties and Compliance Notices

There are two types of civil sanctions referred to as 'discretionary requirements': variable monetary penalties (VMPs) and compliance notices (referred to in the SUCBCRs as non-monetary discretionary requirements). Discretionary requirements can be imposed for any breach of the SUCBCRs and the Council will consider which is appropriate on a case by case basis.

For breaches relating to the requirements to charge and to keep, retain, supply and publish records, the Council will have a

choice about whether to impose an FMP or discretionary requirements. For breaches which concern giving false or misleading information to the Council or otherwise obstructing or failing to assist the Council without reasonable cause, discretionary requirements are the sole type of civil sanction available.

The SUCBCRs set upper limits for VMPs and, within those limits, the Council has discretion to impose whatever amount it considers appropriate in the circumstances.

The upper limits are set out in table below:

Breach	Maximum VMP
Breach relating to: – failure to charge; and/or – failure to keep, retain, supply or publish records	£5,000
Breach relating to: – giving false or misleading information to the Council; and/or – otherwise obstructing or failing to assist the Council	£20,000

Discretionary requirements cannot be combined with FMPs, but financial and non-financial discretionary requirements can be imposed together for the same breach at the same time. The Council can also impose more than one non-financial

requirement at the same time and can do so in combination with a VMP also. The table below illustrates the combination of sanctions that can be imposed at the same time in the relation to the same breach:

Combination of sanctions imposing discretionary requirements for a single breach		
VMP + FMP		No
Compliance Notice + FMP		No
VMP on its own	Yes	
Compliance Notice on its own	Yes	
VMP + Compliance Notice	Yes	
VMP + more than one Compliance Notice	Yes	
More than one VMP		No
More than one Compliance Notice	Yes	

The combinations of sanctions above are allowable only if the sanctions are imposed at the same time. This is because the SUCBCRs expressly prohibit the imposition of discretionary requirements on more than one occasion for the same breach.

Discretionary requirements are likely to be suitable for more serious cases of non-compliance, such as where there is evidence of intentional disregard of the law or repeated non-compliance, as detailed below. Ultimately the object of enforcement by the Council is to secure compliance with the law and the civil sanctioning powers under the SUCBCRs are intended to secure such compliance where informal efforts have failed to produce the desired outcomes. These powers are therefore designed to:

- (a) target the offending behaviour;
- (b) remove the benefit of non-compliance;
- (c) deter future non-compliance.

Compliance Notices are focussed on (a); the purpose of VMPs is to produce the results at (b) and (c).

Our enforcement approach

The Council anticipates that it will be able to resolve most breaches of the SUCBCRs through constructive compliance dialogue with the business in question.

Where resolution cannot be achieved easily or quickly, the civil sanctioning powers will allow the Council to adopt a graduated approach towards requiring the business to comply with its obligations under the SUCBCRs. Even when a breach has occurred, the Council will work with the seller to understand the reasons for any breach, and provide advice to the seller to make it easier to comply with the SUCBCRs in future, before it considers taking enforcement action.

Before initiating any compliance or enforcement action with a seller suspected of breaching the SUCBCRs, the Council will always have regard to any arrangements already in place where the business has established a relationship with another local authority within the UK.

Annex A illustrates the series of events and trigger points that may lead to the use of the various civil sanctions available. The following paragraphs

explain each of the civil sanctions available and the criteria that will be applied at each stage to determine which route or option will be most appropriate in a given case or scenario.

The Council does not intend to undertake proactive enforcement activity in relation to the SUCBCRs but will provide advice and guidance in response to requests from business or in response to complaints or information about compliance breaches. Where the Council has reason to believe that a business may be failing to comply with the requirements of the SUCBCRs, it will in the first instance adopt an advisory approach, through discussions with the seller. This will most often involve a visit by a Council officer to discuss the issue with the seller in question to determine what might have caused the suspected breach, and what steps should be taken by the seller to bring itself into compliance if necessary. In those instances where the seller is located outside of the Council's area, such discussion will most likely take place over the phone or via e-mail.

However, where resolution cannot be achieved easily or quickly (for example because of significant delays on the part of the seller in complying with the SUCBCRs requirements without a reasonable explanation), the civil sanctioning powers will allow the Council to adopt a graduated approach towards requiring the seller to comply with its obligations under the SUCBCRs. Where a seller is not complying but explains readily and openly why it is having difficulty complying, and such an explanation is reasonable, then the Council will work with the seller where it can to help it comply, and not move to impose a penalty. Where is continuing non-compliance despite Council help and advice having been previously given to the seller, it is likely that the Council will

move to impose a civil sanction upon the seller.

Further breaches

Once the initial discussion has taken place, and any help or advice given, the Council will in most cases pro-actively monitor whether or not the seller is now compliant with the requirements of the SUCBCRs. If further complaints from consumers or businesses are received that suggest that the seller is continuing to breach the SUCBCRs, then further action will usually be considered.

In most cases, this is likely to be the imposition of a Fixed Monetary Penalty, unless the seller is able to evidence why he or she is still prevented from complying with the requirements of the SUCBCRs because of circumstances beyond its reasonable control.

Where the Council reasonably believes that there has been a deliberate or persistent failure to comply with a requirement of the SUCBCRs following such advice, it may use its investigatory powers under the SUCBCRs. Authorised officers of the Council may make test purchases; inspect goods; enter premises; question a seller, or officers or employees of a seller; require the production of documents; and, require the provision of information.

Where further intelligence suggests that a seller is continuing to breach the SUCBCRs after a discussion has taken place, one of the key issues affecting the decision of the Council as to which next step is taken (whether a Fixed Monetary Penalty (FMP) or a Compliance Notice should be imposed) will be the degree of cooperation shown by the seller in previous interactions (for example the readiness with which the seller has discussed any difficulties it has had in complying with the SUCBCRs requirements) and any other circumstances beyond the seller's control

that may be making compliance difficult. In those cases where a seller has shown a repeated or significant reluctance to comply or a refusal to take adequate steps to ensure that it will not breach the SUCBCRs in future, or has been obstructive or provided false information, then the Council may decide not to impose a FMP but move to impose a Non-Monetary Discretionary Requirement (Compliance Notice) instead, possibly coupled with a Variable Monetary Penalty (VMP).

Where the Council determines that the continued breach of the SUCBCRs is due to negligence on the part of the seller rather than deliberate lack of compliance, it is likely to consider that an FMP provides a proportionate means to signal the need for a seller to pay more serious attention to its obligations under the SUCBCRs and to prioritise its compliance efforts.

FMPs are not appropriate for more serious cases of non-compliance, such as where there is evidence of intentional disregard of the law, or repeated breaches.

Procedure for issuing a Fixed Monetary Penalty (FMP)

Notice of Intent

Before imposing a Fixed Monetary Penalty (FMP), the Council will always serve a notice of its intention to impose an FMP on the seller. This notice will include certain information about the proposed penalty, the seller's opportunity to discharge its liability to the penalty and next steps.

The notice will deal with the following:

- the amount of the fixed penalty, as set out in the table at paragraph 11;
- discharge of liability – the information given here will be:
 - the fact that the seller can discharge its liability to the penalty if it pays a sum equivalent to 50% of the FMP amount within 28 days (referred to in the remainder of this Guidance as a “discharge payment”);
 - the fact that if the seller does pay the discharge payment within 28 days, no further sanction can be imposed for the breach;
 - the fact that the 28 day period runs from the date on which the notice of intent is received by the seller, not the date on which the notice is sent by the Council. This means that the method by which the notice is served may affect the date on which the 28 day period ends; for example, a notice sent by first class post at the beginning of a bank holiday weekend will be received on a different date to a notice sent by e-mail at the beginning of a normal working day.
- the reason(s) why the Council proposes to impose the penalty;
- the fact that if the seller decides not to make a discharge payment, it has a right to make representations and objections to the Council within 28 days of receiving the notice;
- information about the circumstances in which the Council cannot impose the fixed penalty (these are dealt with immediately below); and
- information on how payment of FMPs and discharge payments can be made.

The circumstances in which the Council is not entitled to impose the penalty are as follows:

- a) if the seller makes a discharge payment within 28 days of receiving the notice of intent;
- b) if the seller has previously made a discharge payment in relation to the same breach.
- c) if the Council has previously imposed an FMP for the same breach;
- d) if the Council has previously imposed a discretionary requirement in relation to the same breach;
- e) if the Council is not satisfied on the balance of probabilities that the breach has occurred.

The seller's response

A seller who receives a notice of intent has three options:

- the seller can make the discharge payment within 28 days, in which case the FMP process ends and the seller is not liable to any further sanction;
- the seller can decide not to make the discharge payment and instead, can submit its representations and / or its objections to the Council about the proposal to impose the FMP. The seller has 28 days to do so. In this scenario, the Council must take the representations and / or objections into account in deciding whether to impose the FMP;
- the seller can do nothing, in which case the Council will wait 28 days and then proceed to decide whether to impose the FMP without the benefit of the seller's views.

The decision

Once the 28 days have passed, the Council will decide whether to impose the FMP in the light of all the circumstances. If representations or objections have been duly made by the seller, the Council will take these into account. In order to be able to impose the FMP, the Council must be satisfied on the balance of probabilities that the breach in question has occurred.

Even if the Council is satisfied on the balance of probabilities that the breach has occurred, the Council can nevertheless decide not to impose the FMP if it takes the view that in all the circumstances of the case, imposing the FMP would be unsuited to the end in view. This could be the case for example, if the seller in question is no longer trading, or is no longer using single use carrier bags?.

The Council will notify a seller if a decision is made not to impose an FMP.

The final notice

Where the Council decides to impose the FMP it will do so by serving a final notice on the seller. The final notice will contain certain information in relation to the penalty, the decision to impose it and next steps. The information is:

- the amount of the penalty - this will be the same as the amount set out in the notice of intent;
- the Council's response to any representations or objections made by the seller;
- the Council's reasons for imposing the FMP;
- the fact that the FMP must be paid within 56 days of the date the notice is received by the seller;
- the fact that if the seller pays 50% of the FMP within 28 days of receiving the notice no further

sanction can be imposed in relation to the breach;

- the date on which that 28 day period ends;
- the fact that if the seller does not pay the FMP within 56 days of receiving the notice the FMP is increased by 50%;
- how the seller can pay the penalty;
- the seller's right to appeal to the First-tier Tribunal and the grounds on which the seller can do so - that is to say:
 - that the decision to impose the FMP was based on an error of fact;
 - that the decision was wrong in law;
 - that the decision was unreasonable for any other reason;
 - any other reason;
- that if the seller appeals the notice, then the notice is suspended pending the determination of the appeal;
- that if the seller does not pay the penalty (and does not successfully appeal), the Council can recover the unpaid amount, together with costs, through the civil courts in the ways outlined in paragraphs 92-97; and
- information on how payment of FMPs and discharge payments can be made.

Where the Council imposes an FMP, it is not entitled to recover from the seller any enforcement costs.

Discretionary Requirements: Compliance Notices

Where the Council receives further information, following the imposition of an FMP, suggesting that a seller is continuing to breach the requirements of the SUCBCRs, then it is likely to move to issue a Compliance Notice. In those instances where the Council receives further information after a discussion has taken place that a seller is continuing to breach the requirements of the SUCBCRs, and the Council determines that

- such a breach is due to wilful disregard for the legislation, or
- the degree of negligence in failing to take all reasonable steps necessary to enable it to fulfil its obligations under the SUCBCRs is likely to cause continued future breaches by the seller;

then the Council may decide immediately to move to issue a Notice of Intent to impose a Compliance Notice rather than to issue an FMP.

At this stage the Council will also consider whether or not also to impose a Variable Monetary Penalty (VMP), depending upon the seriousness of the breach and the attitude of the seller. In exceptional circumstances, where the Council believes that the imposition of an FMP would not secure the future compliance of the seller, for instance where the degree of resistance to comply with the SUCBCRs requirements is extremely high, then the Council may move to impose a Compliance Notice (with or without a VMP) without first imposing an FMP. However, the Council does not expect this situation to arise very often as the Government expects sellers to work constructively with the Council to achieve voluntary compliance.

The key issue for the Council to consider when determining whether or not to impose a VMP alongside a Compliance Notice will be the degree of cooperation displayed by the seller in its interactions with the local authority up until the point at which a Notice of Intent to impose a Compliance Notice is issued, and the degree to which the Council believes the seller is likely to commit further breaches. Where an FMP has been imposed yet the seller has committed a further breach of the SUCBCRs, and the Council determines that:

- it is not due to wilful disregard for the legislation; or
- it is because of other influences that would suggest that imposition of a VMP would be a disproportionate response to the offence (for instance if the seller were readily and willingly to offer evidence of why it has been extremely difficult to comply with the SUCBCRs requirements because of circumstances outside of the seller's control),

then in these circumstances, the Council will most likely issue a Notice of Intent to impose a Compliance Notice with no accompanying VMP.

Compliance Notices are requirements to take steps to ensure that a breach of the SUCBCRs requirements does not continue or recur. The Council will decide what those steps should be and the time period within which they must be completed. The primary purpose of imposing these requirements is to secure that the seller modifies its behaviour so as to halt an ongoing breach and / or to address the causes that give rise to a breach.

Examples of steps that might be required include the following (albeit that the Council would set out the

requirements with far more detail than is illustrated here):

- training of relevant staff;
- exertion of more control over the availability of single use carrier bags in-store;
- alteration of record-keeping processes;
- repair, maintenance or upgrading of technology;
- publication of records in-store.

If a seller does not fully comply with a Compliance Notice in the time given, the Council can impose a financial penalty (a Non-Compliance Penalty - see paragraphs 65-68).

Discretionary Requirements: Variable Monetary Penalties (VMPs)

Where the Council determines that the continued breach of the SUCBCRs is down to wilful disregard for the legislation, or that the degree of negligence by the seller in failing to take all reasonable steps necessary to enable it to fulfil its obligations under the SUCBCRs is very high, then the Council may decide immediately to move to issue a Notice of Intent to impose a Variable Monetary Penalty (VMP) rather than to issue an FMP. In order to ensure that action taken has the best chance of bringing the seller into compliance, the VMP will always be accompanied by a Compliance Notice, formally setting out the steps that the Council believes that the seller needs to take to bring itself into compliance.

However, in most cases it is envisaged that the issuing of a VMP will be as a result of the need for continued enforcement to deter a seller from continuing to fail to meet its obligations under the SUCBCRs (i.e. that a FMP will already have been issued for a similar breach, and that a

Compliance Notice alone is unlikely to be sufficient to bring the seller into compliance).

Once the Council has decided to issue a Notice of Intent to impose a VMP, it will use the methodology in Annex B to this guidance to determine the appropriate level of penalty to impose.

Procedure for issuing a Discretionary Requirement Notice of intent

The Council will begin by serving a notice of its intention to impose the discretionary requirements. The notice will include certain information about the proposed penalties and next steps. Unlike FMPs, there is no facility for the seller to discharge its liability to the penalties by making a discharge payment.

The information that the notice will include will depend on whether the Council intends to impose a VMP, a Compliance Notice, or both.

If the proposal is to impose a Compliance Notice, whether or not in combination with a VMP, the notice will be specific about the steps that the Council proposes to require the seller to take. The notice will also specify the time period that the seller will have to complete those steps if the requirements are ultimately imposed.

If the proposal is to impose a VMP in combination with a Compliance Notice, the notice will specify the amount of the VMP and how the seller will be able to make the payment.

Regardless of which discretionary requirements the Council proposes to impose, the notice of intent must always include the following information:

- the reason(s) why the Council proposes to impose the discretionary requirements;
- the fact that the seller is entitled to make representations and objections to the Council within 28 days of receiving the notice, and notification of the date on which the 28 day period ends; and
- the circumstances in which the Council cannot impose the discretionary requirements (these are dealt with immediately below).

The circumstances in which the Council is not entitled to impose a discretionary requirement are:

- a) if a discretionary requirement has previously been imposed in relation to the same breach;
- b) if the seller has previously made an FMP discharge payment in relation to the same breach;
- c) if an FMP has previously been imposed in relation to the same breach;
- d) if the Council is not satisfied on the balance of probabilities that the breach has occurred.

The notice will also include information about how payments of a VMP can be made.

The seller's response

A seller who receives a notice of intent has two options:

- the seller can submit representations and / or objections to the Council about the proposal to impose the requirements. The seller has 28 days to do so and the Council will take these representations and objections into account in making its final decision about imposing requirements;
- the seller can do nothing, in which case the Council will wait 28 days and then proceed to make a final decision about imposing requirements.

The decision

Once the 28 days have elapsed the Council will decide whether to impose the discretionary requirements as originally intended, whether to impose them with modifications, or whether instead to impose different discretionary requirements. The Council will take any representations or objections submitted by the seller into account, together with all the circumstances of the case. The Council will only impose requirements if satisfied on the balance of probabilities that the breach has occurred.

It could be the case for example that a seller's representations reveal that the seller did in fact take all reasonable steps to comply with the requirements of the legislation, or that it did have reasonable grounds for failing to assist the Council. Accordingly, the Council is likely to decide not to impose any discretionary requirements.

The Council might decide at this stage to impose the discretionary requirements, but to modify one or more of them before doing so. This could occur for example if the severity of a discretionary requirement originally proposed is

revealed to be disproportionate in light of the seller's circumstances, or vice versa. In the event that one or more discretionary requirements are modified, the Council will not issue a second Notice of Intent but rather will include such modifications within the Final Notice, which is explained at paragraphs 61-64.

The Council might conclude in light of the seller's representations that the discretionary requirements originally proposed are unsuitable and should be replaced with different requirements. This might occur, for example, where the original discretionary requirements were informed by previous breaches which appeared to be the result of a seller's lax attitude to compliance, but which circumstances reveal to be the result of connivance to actively circumvent compliance.

Even if the Council is satisfied on the balance of probabilities that the breach occurred, it may nevertheless decide not to impose the discretionary requirements if it takes the view that it would be unproductive to do so in light of all the circumstances. The Council will notify a seller if it (the Council) decides not to impose discretionary requirements.

The final notice

If the Council decides to impose discretionary requirements it will do so by serving a final notice on the seller. The notice will contain certain information about the penalties, the decision to impose them and next steps. The information that the notice will include will depend on whether the Council has decided to impose a Compliance Notice on its own, or a Compliance Notice in combination with a VMP.

If Compliance Notices are to be imposed, whether or not in combination with a VMP, the notice will be specific about the steps that the seller is required to take. The notice will also specify the time

period within which the steps must be completed and will explain that if the seller fails to do so, it will be liable to further enforcement action in the form of non-compliance penalties.

If a VMP is to be imposed in combination with a Compliance Notice, the notice will specify the amount of the VMP and how the seller can make the payment. The notice will also explain:

- the effect (if any) of the seller's representations and / or objections, on the amount of the VMP imposed;
- that the VMP must be paid within 56 days of the notice being received and the date on which that period ends;
- the fact that if the seller pays 50% of the VMP within 28 days of receiving the notice no further sanction can be imposed for the breach;
- the date on which the 28 day period ends; and
- the fact that if the seller does not pay the VMP within 56 days of receiving the notice the VMP is increased by 50%.

Regardless of which discretionary requirements are being imposed, a final notice will always include the following:

- the reason(s) why the Council is imposing the requirements;
- the Council's response to any representations or objections duly submitted by the seller;
- the seller's right to appeal to the First-tier Tribunal against the decision to impose the requirement(s) and the grounds on which the seller can do so - that is to say:

- that the decision was based on an error of fact;
- that the decision was wrong in law;
- that the amount of the VMP is unreasonable (if one is imposed);
- that the nature of a non-monetary discretionary requirement is unreasonable (if one is imposed);
- that the decision was unreasonable for any other reason;
- any other reason;
- that if the seller appeals the notice, then the notice is suspended pending the determination of the appeal; and
- that if the seller does not pay the VMP (and does not successfully appeal), the Council can recover the unpaid amount, together with costs, through the civil courts in the ways outlined in paragraphs 92-97.

Non-Compliance Penalty (NCP)

If a seller does not complete all of the steps required by a Compliance Notice by the completion date, the Council can impose a financial penalty. A non-compliance penalty is a financial penalty to replace a Compliance Notice with which the seller has not complied. For this reason the Council can impose a non-compliance penalty even if a VMP was imposed at the same time as the Compliance Notice. For this reason also, if a seller completes the steps required by the Compliance Notice before the time period for payment of the non-compliance penalty expires, the seller is not required to pay the non-compliance penalty.

The procedure for imposing non-compliance penalties is similar to the procedure for imposing FMPs and discretionary requirements.

The procedure has broadly two stages: an advance notification stage and a final determination stage.

It could be that the seller takes none of the steps required by the Compliance Notice, or that the seller takes some, but not all of the steps; a non-compliance penalty can be imposed in either case and the maximum amount that can be imposed is £5,000.

The Council will use the same methodology as that for calculating an appropriate level of VMP, which is attached at Annex B. This has been adopted by all local authorities in Wales.

Procedure for issuing a Non-Compliance Penalty Notice of intent

Once the time period for compliance with a Compliance Notice has elapsed, and the seller has failed to comply with the requirements within it, the Council is likely to move to serve a notice of its intention to impose a non-compliance penalty. The notice will contain information about the penalty, the Compliance Notice requirement(s) to which it relates and next steps. The notice will deal with the following:

- whether the proposal to impose the penalty relates to a complete or partial failure to comply with the Compliance Notice requirement, including the steps which the seller has yet to take to comply with it;
- the amount of the penalty proposed, when payment would be due and how payment can be made;
- the fact that if the penalty is not paid by the date it is due the amount will be increased by 50% and if it remains unpaid after that, it can be recovered through the civil courts in the ways outlined in section 7.4.2;

- the fact that the seller has 28 days from the date the notice is received to make representations and objections to the Council; and
- any circumstances in which the Council might consider reducing the amount of the penalty proposed.

The seller's response

A seller who receives a notice of intent to impose a non-compliance penalty will have two options:

- submit representations or objections within 28 days, in which case the Council will take these into account in deciding whether to impose the non-compliance penalty and at what level; or
- do nothing, in which case the Council will make its decision about imposing the penalty without the benefit of the seller's views.

Final determination

This stage involves the Council considering any representations or objections duly submitted by the seller, along with all the circumstances of the case and making a decision about whether to impose the noncompliance penalty and if so, at what level.

The decision

Once the 28 days have elapsed the Council will decide whether to impose the penalty and if so, what the amount of the penalty should be. It could be the case, for example, that the seller's representations disclose that the seller had taken more steps than the Council had appreciated at the time the notice of intent was served. In this case the level of the penalty originally proposed might be considered by the Council to be too high in the circumstances and should thus be reduced to reflect the additional costs incurred by the seller.

Even if the Council is satisfied that the seller has not completed all of the steps required by the Compliance Notice, it may nevertheless decide not to impose a non-compliance penalty if it takes the view that it would be unsuitable in the circumstances. This could be the case for example, where the steps remaining to be completed either cannot be completed, or their purpose would not be served even if completed; a requirement to train Sunday staff where a retailer no longer trades on Sundays might fall into this category.

The Council will notify a seller if it (the Council) decides not to impose a non-compliance penalty.

The non-compliance penalty notice

If the Council decides to impose a non-compliance penalty it will do so by serving a non-compliance penalty notice on the seller. The notice will contain certain information about the penalty, the decision to impose it and next steps.

The notice will deal with:

- the reasons for imposing the penalty;
- the Council's response to any representations or objections received from the seller, including the effect that they had on the amount of the penalty imposed;
- the amount of the penalty, the date by which payment must be made and how payment can be made;
- the fact that if the payment is not made by the date it is due the amount of the penalty will increase by 50% and that if it remains unpaid after that, the Council can recover it through the civil courts, together with costs;
- the seller's right to appeal to the First-tier Tribunal and the grounds

on which an appeal can be brought; that is to say:

- that the decision to serve the notice was based on error of fact;
- that the decision was wrong in law;
- that the amount of the penalty is unreasonable;
- that the decision was unfair or unreasonable for any other reason;
- any other reason.

Although the SUCBCRs do not impose a statutory obligation on administrators to do so, the final notice will also inform a seller that, if the seller appeals the notice, the notice is suspended pending the determination of the appeal.

Enforcement Costs Recovery

The Council can require a seller to pay the costs that the Council has reasonably incurred in relation to imposing discretionary requirements. The Council cannot recover the costs of imposing FMPs. If the Council intends to impose a discretionary requirement, it is likely already to have committed considerable resources to the case and will usually want to recover from the business any enforcement costs reasonably incurred in relation to imposing such discretionary requirement(s). In these cases, the Council will serve an Enforcement Costs Recovery Notice at the same time as the Notice of Intent to impose the discretionary requirement(s). If the Council subsequently decides not to impose the discretionary requirement, it will also withdraw the Enforcement Costs Recovery Notice.

The procedure for recovering enforcement costs from sellers is set out in regulation 16 and involves serving a notice on the seller. Unlike FMPs and discretionary requirements, this is a

single stage procedure which does not require the Council to serve advance notice of its intention to recover its costs from the seller. Enforcement costs are not exhaustively defined in the SUCBCRs but they do expressly include investigation costs, administration costs and the costs of obtaining expert advice, including legal advice.

An enforcement costs recovery notice will include certain information about the costs and next steps. The notice will include information about:

- the amount of the costs, the date by which payment must be made and the method by which the seller can make the payment;
- the fact that if the seller does not pay the costs by the date they are due to be paid, the Council can recover those costs through the civil courts, together with the costs of doing so;
- the seller's right to appeal to the First-tier Tribunal against:
 - the decision to impose the requirement to pay costs; and/or
 - the decision as to the amount of those costs.

The SUCBCRs impose a statutory duty on the Council to provide a detailed breakdown of its enforcement costs if requested by the seller to do so. However, in order to aid transparency, avoid unnecessary delays and contribute to good regulatory practice, the Council will always provide this breakdown at the same time as it serves an enforcement costs recovery notice. The notice will also explain that the seller is not liable to pay any costs shown by it to have been unnecessarily incurred and that, if the seller appeals the notice, the notice is suspended pending the determination of the appeal.

Appeals

The SUCBCRs confer a right of appeal against;

- the imposition of a fixed monetary penalty, discretionary requirement or non-compliance penalty;
- a requirement to pay enforcement costs or the amount of the costs;

There is no right of appeal against a notice of intent to impose a fixed monetary penalty, discretionary requirement or non-compliance penalty.

Appeals are made to the General Regulatory Chamber of the First-tier Tribunal. Appeals are made by sending a notice of appeal to the Tribunal so that it is received by the Tribunal within 28 days of the date on which the notice of the civil sanction or other decision was sent to the seller. The First-tier Tribunal's address is:

HM Courts and Tribunal Service
The First-tier Tribunal (Environment)
General Regulatory Chamber
PO Box 9300
Leicester
LE1 8DJ

The Tribunal Rules⁵, together with any practice directions given by the Senior President of Tribunals or Chamber President, govern the practice and procedure to be followed by the First-tier Tribunal. The overriding objective of the Rules is to enable the Tribunal to deal with cases fairly and justly, which includes dealing with cases in ways that are proportionate to the importance of the case, the complexity of the issues,

⁵ The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009; available at: <http://www.legislation.gov.uk/uksi/2009/1976/contents/made>.

the anticipated costs and the resources of the parties.

If the question of whether a breach has or has not been committed is one that the Tribunal needs to determine in any appeal, the Council will carry the burden of proof. This means that it will not be for the seller to prove that it did not breach the SUCBCRs, it will be for the Council to prove on the balance of probabilities that the seller did.

The grounds on which an appeal can be brought against any particular decision are set out in the SUCBCRs⁶. In some cases the grounds include “any other grounds”. This is intended to secure that a seller’s right of appeal is not inadvertently or artificially constrained; it is not intended to infer that unmeritorious appeals could succeed or should be brought.

The Tribunal Rules give the Tribunal wide case management powers which include the power to strike out proceeding if it considers that there is no reasonable prospect of the appellant’s case, or any part of it, succeeding. The Rules also allow the Tribunal to award costs against a party, but only where a party has acted unreasonably in bringing, defending or conducting the proceedings.

The Lord Chancellor has the power to charge fees for appeals to the Tribunal. Before doing so, the Lord Chancellor is required to consult the Senior President of Tribunals and the Administrative Justice and Tribunals Council, and must conduct a public consultation. Any decision to charge fees could then only take effect if contained in secondary legislation approved by both Houses of Parliament. At the date of this Guidance no formal proposal to charge fees for

appeals to the General Regulatory Chamber of the Tribunal has been made by the Lord Chancellor.

Any party to a case can appeal a decision of the First-tier Tribunal on a point of law arising from the Tribunal’s decision. To do so, permission from the First-tier Tribunal or the Upper Tribunal must be obtained. If permission is given, the appeal would be heard by the Administrative Appeals Chamber of the Upper Tribunal.

More information about the First-tier and Upper Tribunals can be found here: <http://www.tribunals.gov.uk/index.htm>.

Recovering Unpaid Penalties and Enforcement Costs

Any monetary penalties or enforcement costs that remain unpaid after the statutory time limit for payment has elapsed can be enforced through the civil courts. The procedure for how that is achieved will depend on whether the imposition of a penalty or a decision in relation to enforcement costs is appealed.

Procedure where there is an appeal

If the decision is appealed and the First-tier Tribunal finds in favour of the Council, the unpaid amount will be recoverable from the seller as if payable under an order of a county court or the High Court in England and Wales⁷. This means, in effect, that the Council can bypass the initial stage of registering a claim for the unpaid amount in the courts and will be able to proceed directly to enforcement.

In this scenario, the Council does not need to seek an order from the court to allow it to proceed to enforcement; it applies directly to the court for a specific

⁶ Schedule 2, paragraph 11(2) and Schedule 3, paragraph 10(2)

⁷ See section 27 of the Tribunals, Courts and Enforcement Act 2007. Available at: <http://www.legislation.gov.uk/ukpga/2007/15/contents>.

method of enforcement (see below for more on methods of enforcement).

Procedure where there is no appeal

If a decision is not appealed, the Council has a choice about how to enforce payment. It can recover the outstanding amount as a civil debt, or on the order of a court, as if payable under a court order.

If the Council decides to pursue the amount as a civil debt it will initiate recovery proceedings in the usual way by registering a claim in court.

If the Council decides to recover the amount as if payable under a court order, it will bypass the initial stage of registering a claim and instead, apply to the court for an order to allow it to proceed to enforcement. The application must be made to the court for the district where the person against whom the order is sought resides or carries on business, unless the court orders otherwise. The application can be dealt with by a court officer without a hearing. Once an order has been made, the Council can proceed to enforcement.

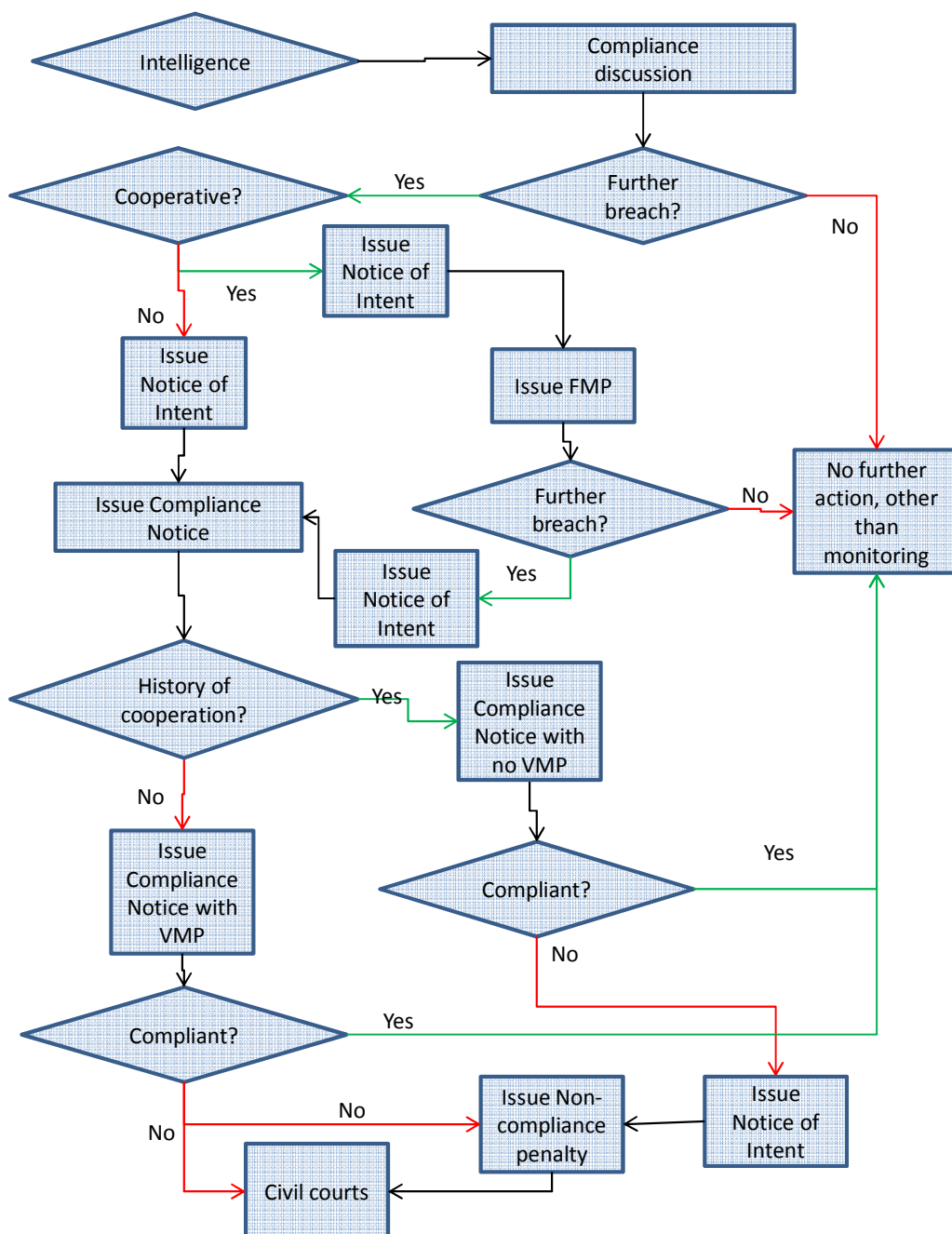
Methods of enforcement

Once an order has been obtained the Council will have a number of enforcement options available to pursue. These include:

- A warrant of execution – which allows a bailiff to seize goods or money to the value of the amount being recovered;
- A charging order – which is an order of the court placing a 'charge' on property so that the debt due is paid from the proceeds of sale before the debtor receives those proceeds. If the debt remained unpaid after a charging order was made, the Council could ultimately request a court to make an order forcing a debtor to sell the charged property to pay the debt due.
- A third party debt order – which is served on a person who holds the debtor's money (such as a bank) or who owes money to the debtor; the effect is to require the third party to pay the outstanding debt directly to the creditor from the debtor's money.

The Council will have to pay court fees which can be added to the outstanding amount and recovered from the debtor.

SUCBCRs decision making process





Annex B

Extracts from the Single Use Carrier Bag Charge (Wales) Regulations 2010⁸ relevant to requirements to charge for single use carrier bags and to keep records

Requirement to charge

6.—

- (1) A seller must charge for every single use carrier bag supplied new—
 - (a) at the place in Wales where the goods are sold, for the purpose of enabling the goods to be taken away;
 - (b) for the purpose of enabling the goods to be delivered to persons in Wales.

This is subject to regulation 7.

- (2) The amount that a seller must charge is such amount as ensures that the consideration paid by a customer for each single use carrier bag is not less than 5 pence

Exemption from the requirement to charge

7. — Regulation 6 does not apply in relation to the supply of single use carrier bags of the kinds described in Schedule 1 and that Schedule has effect accordingly.

Record-keeping

7A.—

- (1) This Part applies to a seller in relation to any reporting year in which the seller meets the condition in paragraph (2).
- (2) The condition is that on the first day of the reporting year the seller employs ten or more full time equivalent members of staff

8.—

- (1) A seller must keep a record of the information specified in paragraph (3) for every reporting year.
- (2) Records must be retained by a seller for a period of three years beginning on 31 May in the reporting year following that to which a record relates.
- (3) The information is—
 - (a) the number of single use carrier bags supplied which attract the charge;
 - (b) the amount received by way of consideration for single use carrier bags which attract the charge;
 - (c) the amount received by way of the charge;

⁸ As amended by the Single Use Carrier Bags Charge (Wales) (Amendment) Regulations 2011

- (d) the net proceeds of the charge⁹;
 - (e) a breakdown of how the amount which represents the difference between the amount received by way of the charge and the net proceeds of the charge has been arrived at, including—
 - (i) the apportionment between any chargeable VAT and reasonable costs;
 - (ii) the apportionment between different heads of reasonable costs;
 - (f) the uses to which the net proceeds of the charge have been put.
- (4) The following are the amounts specified for the purposes of the definition of “net proceeds of the charge” in paragraph 7(4) of Schedule 6 to the Climate Change Act 2008¹⁰—
- (a) any amount in excess of the charge received by way of consideration for single use carrier bags which attract the charge;
 - (b) any amount of chargeable VAT received by way of the charge;
 - (c) the amount of any reasonable costs.
- (5) In this regulation “reasonable costs” (“*costau rhesymol*”) means—
- (a) costs reasonably incurred by a seller to enable the seller to comply with these Regulations;
 - (b) costs reasonably incurred by a seller to enable the seller to

communicate information about the charge to customers.

This is subject to paragraph (6).

- (6) In relation to the first reporting year, “reasonable costs” includes costs reasonably incurred by a seller before the date on which these Regulations come into force —
- (a) to enable the seller to comply with these Regulations;
 - (b) to enable the seller to communicate information about the charge to customers

Availability of records

9.—

- (1) This regulation applies where a person mentioned in paragraph (4) requests a seller in writing to supply a record for a reporting year.
- (2) If the request is received during the retention period for the record in question, the seller must provide a copy of that record to the person who requested it within 28 days of receiving the written request.
- (3) The retention period is the three year period for which any particular record must be retained under regulation 8(2).
- (4) The persons are—
 - (a) the Welsh Ministers;
 - (b) a member of the public.

Publication of records

10.—

- (1) A seller must publish the record for a reporting year if the conditions in paragraph (2) are met by the seller in relation to the reporting year in question.
- (2) The conditions are—

⁹ For the meaning of “net proceeds of the charge” see paragraph 7(4) of Schedule 6 to the Climate Change Act 2008

¹⁰ 2008 c. 27

- (a) that the seller is a taxable person for the purposes of the Value Added Tax Act 1994;
 - (b) that the seller supplies 1000 or more single use carrier bags which attract the charge.
- (3) A seller must publish the record on or before 31 May in the reporting year following that to which the record relates.
- (4) The record must remain published until 31 May in the following reporting year.
- (5) Publication must be by way of—
 - (a) the seller's internet site; or
 - (b) the display of a notice containing the record in all of the seller's premises in Wales

- to which customers have access.
- (6) If a seller publishes the record by way of its internet site—
 - (a) the record must be displayed prominently on the seller's home page; or
 - (b) if the record is to be displayed elsewhere on the seller's internet site, a link to the record must be displayed prominently on the seller's home page.
- (7) If a seller publishes the record in the way described in paragraph (5)(b), the notice must be displayed in a prominent position so that it is clearly visible to, and readable by, customers

Annex C

Methodology for calculating Variable Monetary Penalty (VMP) and Non-Compliance Penalty

Where the Council has decided to impose a Variable Monetary Penalty or a Non-Compliance Penalty, it will use the following methodology to calculate the amount of that penalty.

The Guidance published by the Welsh Government includes a provision for an objective point to be established by reference to which local authorities can settle on a starting sum, which can then be adjusted by reference to aggravating and mitigating factors to arrive at the initial VMP figure in any particular case. This initial VMP figure should then be added to the figure representing the benefit from non-compliance, with

compliance costs deducted and the whole amount capped in line with the VMP maxima.

For the purposes of calculating VMP and NCP amounts, the objective point to be used will be:

The net profit in Wales of the business in question +/- adjustment for mitigating factors

Using this objective point, the local authority will determine the initial VMP or NCP figure by reference to the following table:

VMP (Failure to charge / keep records) or Non-Compliance Penalty

[Gross/Net] Profit	Initial VMP / NCP figure
>£1,000,000	£5,000
£500,000 - £1,000,000	£4,000
£100,000 - £500,000	£3,000
£20,000 - £100,000	£2,000
<£20,000	£1,000

VMP (false/misleading information or obstruction)

[Gross/Net] Profit	Initial VMP figure
>£1,000,000	£20,000
£500,000 - £1,000,000	£16,000
£100,000 - £500,000	£12,000
£20,000 - £100,000	£8,000
<£20,000	£4,000

Because the calculation of the VMP is based upon the annual net profit of the business, before issuing a Notice of Intent to impose a VMP, the Council will first need to require this information from the business.

Adjustment for mitigating factors (common to all Options)

Where the local authority decides that there have been significant aggravating factors (such as refusal to cooperate with reasonable requests for information, ignoring earlier advice or guidance, failure to take reasonable compliance actions, or continued non-compliance on principle), such aggravating factors could result in a higher VMP or NCP figure from a higher band being imposed. Each significant aggravating factor would

escalate the VMP or NCP figure by one band.

Similarly, where there is evidence that the business has made considerable efforts to comply (for example voluntarily providing information and assistance to the Council, acting swiftly to address areas of non-compliance, working with the Council to frame suitable Compliance Notice requirements, or voluntary reporting of non-compliance) or there are personal circumstances that would have made compliance less easy to achieve, such factors could result in a lower VMP or NCP amount being levied. Each significant mitigating factor would decrease the VMP or NCP figure by one band.