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From: Marcus Porter
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Subject: RE: NIRHI Guidance query
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Michelle

Thanks for this. You make an important point.

Am I right in thinking that the intention is that the NI guidance will be badged as DETI guidance (unlike the GB guidance, which is badged as Ofgem's)? I seem to recall that's what we were envisaging and it seems to sit well with the facts that (a) it's proposed that DETI will run the guidance consultation process (b) Ofgem will not be named in the Regs and (c) it's theoretically possible (though hopefully unlikely) that at some point DETI may decide to take over the administration of the scheme themselves.

I'm also taking it that, as in the GB guidance, near the beginning of the NI guidance there will be Sections headed "Context" and "Executive Summary" and that they will look much the same as their GB counterparts.

On that basis the NI guidance should follow the GB Guidance in mentioning in these Sections the statutory basis for the NI scheme (which in the case of NI includes the power to enter into arrangements under s.114 of the EA 2011) and state that such arrangements have indeed been entered into.

There may be other parts too of the NI guidance which, in following the corresponding parts of the GB guidance, will need to advert to the fact that we will be administering the scheme on behalf of DETI. Doubtless the Section relating to the procedure for applying for accreditation/registration is a case in point, though I haven't checked.

Passages in the guidance such as those you mention below will need to reflect the above and, in answer to your question, do need to pick up on the separation of powers.

The guidance is different from the Regs in that respect: Ofgem are not mentioned in the Regs and shouldn't be – the reason being that we are able to be involved in the administration of the Regs only by virtue of and by acting in accordance with section 114 of the EA 2011 which provides for DETI to enter into arrangements with us whereby we administer on their behalf. The arrangements are the sole source of our power and are separate from the Regs – which should refer only to DETI. By contrast, the function of the guidance is to explain in non-legalistic terms how the scheme works and it is a central feature of the scheme that Ofgem is to be responsible for administration – a fact which we clearly need to mention to potential applicants.

In the case of 10.4 the term "we" is used (i.e. Ofgem) notwithstanding that in practice it's AEA that does it. So the fact that the work is sub-contracted out isn't reflected in the guidance (or at any rate not in this bit of it). So I think the same approach should be followed in relation to the DETI guidance.

That seems to translate into a para corresponding to GB para 10.4 which says "Ofgem may carry out a site inspection...." and this is notwithstanding that in practice it will be carried out by AEA or whichever other company secures the contract.

As to enforcement, that's slightly more complex, not least because at this point I'm not convinced that we all have a common understanding as regards exactly who will do what.

However I believe the intention, at present at any rate, is that (as in the case of NIRO) DETI will take the Decisions as regards whether to take enforcement action – in light of relevant information re the case concerned that is supplied to them by us.

I further assume that the actual taking of action under the DETI equivalents of the provisions in regs 47, 48(1)(a) and 49 will also be for DETI.

However some enforcement action entails suspending, stopping or offsetting *payments* and I'm assuming that actually taking that step (as opposed to deciding whether to take it) will be down to us – given that we will be *making* payments where there is *no* enforcement action.

Whatever the arrangements are to be, the guidance will need to reflect them and I suggest we proceed for the moment on the basis that the arrangements will be as above. (If they are not then further adjustments to the NI guidance will be necessary).

On that basis, and on the assumption that the word "we" will denote DETI in the NI guidance, para 10.6 (being concerned with *whether* to take enforcement action) should remain as it is. So it will be telling people what DETI will take into account when *they* are considering whether or not to take enforcement action.

Marcus

From: Michelle Murdoch
Sent: 08 August 2012 11:23
To: Marcus Porter
Cc: Keith Avis
Subject: NIRHI Guidance query

Hi Marcus,

This is the query I think you were referring to in the meeting...

Difficult to answer this in the abstract without knowing which guidance volume(s) pages and paras you refer to

Vol. 2 chapter 10 page 70. Compliance and enforcement powers.

10.4 – “...we may undertake a site inspection...” I know now that inspections and audits will be dealt with by a third party, just like it is in the GB scheme by AEA. However how should that be reflected in the guidance or should it be left vague on purpose? The third party will be working for OFGEM but ensuring compliance to the DETI scheme.

10.6 “ In deciding whether to take enforcement action, we will take into consideration all the circumstances surrounding the non-compliance....” OFGEM or DETI? Or doesn’t it matter when it comes to the Guidance at least?

I hope this makes sense...it is the overall tone of this chapter that I am getting at. Do we need to be specific regarding the separation of powers between DETI/OFGEM when it comes to compliance and enforcement, or, in the case of the Guidance at least, does it matter? I picked up on the fact that the GB scheme regulations between OFGEM and DECC reflect a completely different relationship; with DETI there are no specifics when it comes to the regulations and OFGEM’s role. Perhaps the Guidance should follow that lead?

Cheers

Michelle

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