

To: Mary Smith[Mary.Smith@ofgem.gov.uk]
From: Keith Avis
Sent: 2012-12-20T14:31:08Z
Importance: Normal
Subject: RE: NIRHI: DETI Audit wording
Received: 2012-12-20T14:31:10Z

Mary

Here is the response from our legal team. There is a call to be made here in my view. If we start reworking the DETI text then we are in for another round of protracted discussion which could take weeks and I don't think that we will ever get agreement between our legal and DETI. My suggestion would be that we go to Bob, say this is the legal view and as a concession put this wording in the covering letter. We can then make clear to DETI that in agreeing to their wording they will have to accept that this cannot go in the body of the arrangements.

Grateful for your views.

Keith

From: Marcus Porter
Sent: 20 December 2012 13:51
To: Keith Avis
Cc: Ruth Lancaster
Subject: RE: NIRHI: DETI Audit wording

Keith

Nothing attached but no matter. Ruth and I have discussed the wording of the hard copy that you provided and conclude as follows:

The third and fourth paragraphs are unacceptable in our view:

The third paragraph is not significantly less intrusive than the position that would have pertained if we had agreed to the onsite audits that DETI were previously holding out for: It wouldn't be their auditors but they would have a say in fixing the terms of reference of ours and, if they had any concerns regarding those, we'd be obliged to endeavour to ensure those were addressed, i.e. they would effectively have the last word as regards the terms of reference! We'd also have to share the reports with them afterwards. Both these requirements could potentially impact adversely on our ability to act as required by administrative law principles, i.e. independently.

The fourth para is oddly worded as it isn't clear how we could provide DETI with "access rights" relating to payments made to participants given that only the payee would have such access! I assume that it is supposed to relate to access to *details of* payments made, but if so then it should say that and it would already be covered by the second para (if that were acceptable). Be that as it may, the step provided for in this para is clearly linked to the audit referred to in the third para and, as the latter is legally unacceptable, it follows that the fourth must be also.

As to the first para, this would appear to be wide enough to embrace not only impropriety etc. on the part of scheme applicants/participants but also any fraud etc. perpetrated by Ofgem staff. We can understand why DETI would wish to be made aware of any such but we do not think it should be in the arrangements (it should be in the correspondence instead) and the wording should be toned down such that it does not, as it does at present, imply that we have any sort of remit or authority to deal with and determine fraud cases – which should of course have to be referred to the appropriate authorities for further investigation. The correspondence should simply say that, in the event that we *suspect* that these things may have occurred, we will notify DETI of that fact.

In the same connection you can offer DETI the reassurance that notifying them as above would be in line with what we our practice in connection with the GB Scheme in relation to issues which are of general concern, such as large scale metering breaches and there is no obvious reason why we should depart from that approach in relation to DETI, especially if widespread fraud were suspected.

Finally, the second para is legally unacceptable because (setting aside the fact that the use of the informal expression "follow the money" would be inappropriate) what DETI are asking for is already covered by the obligation on us under the arrangements to provide such information relating to our functions under the scheme as they may reasonably require. Applying the provision in the arrangements we would need to consider at the time whether the requirement was indeed reasonable. As to that, the arrangements do not of course contain a detailed list of information that we will supply similar to the list in reg 53 of the GB Regulations but, again, we feel that DETI can be offered the reassurance that (a) we anticipate that, should DETI request information of the same kind as that covered by the monthly reports provided for in reg 53 of the GB Regs then subject, as in the case of the GB Regs, to any applicable legal constraints, there is no reason to suppose they will not get it and (b) that monthly information includes, in relation to individual installations, "the total amount of periodic support payments made in respect of the accredited installation during the period covered by the report" – which does not seem very different to what DETI are asking for.

Marcus

From: Keith Avis
Sent: 20 December 2012 11:34
To: Marcus Porter
Subject: NIRHI: DETI Audit wording

Marcus

Thanks for the discussion. Attached is the electronic version of the wording we talked through. As I say, DETI are pushing hard for this to

form part of the Admin Arrangements - either in the body of the text or as an Annex. I appreciate that the wording as it stands is not consistent with that which is required for this, so this will need some rewording in some areas at the very least.

Rgds

Keith