To: Matthew Harnack[Matthew.Harnack@ofgem.gov.uk]; Jacqueline Balian[Jacqueline.Balian@ofgem.gov.uk]
Cc: Lindsay Goater[Lindsay.Goater@ofgem.gov.uk]; Morag Drummond[Morag.Drummond@ofgem.gov.uk]; Ade Obaye[Ade.Obaye@ofgem.gov.uk]; Laura Missingham[Laura.Missingham@ofgem.gov.uk]; Anne-Marie Shields[Anne-Marie.Shields@ofgem.gov.uk]; Marcus Porter[Marcus.Porter@ofgem.gov.uk]; Faye Nicholls[Faye.Nicholls@ofgem.gov.uk]
From: Ashley Malster
Sent: 2011-11-03T16:04:41Z
Importance: Normal
Subject: Important - legal risk re revoking undeserved accreditation
Received: 2011-11-03T16:04:44Z

Matthew, Jacqueline et al

Please note that a further tricky legal issue that has been highlighted in the legal review – and one which potentially has very important consequences…

Marcus has raised concerns that we do not have a clear, unambiguous ability to revoke someone's accreditation if they applied for accreditation with incorrect information, we accredit on that basis and then subsequently find out about the incorrect information and consider we would have not accredited them if we'd have known. (This is because the revocation power is framed in terms of ongoing obligations)

There may be ways in which we can address this situation if it arose, but these are not legally certain.

I think this is another issue to raise in the discussion with Bob and Matthew, which we can hopefully have at Bob's surgery on Monday.

Anne-Marie – can you add this into the things to fix table with a high priority please.

Ashley

From: Marcus Porter
Sent: 03 November 2011 15:12
To: Ashley Malster
Cc: Faye Nicholls; Ade Obaye; Morag Drummond; Laura Missingham
Subject: RE: FURTHER AMENDMENTS ETC TO VOL 2 OF THE RHI GUIDANCE

Ashley

One further observation if I may:

Pending any amendment of the regs by DECC to address these issues, you may consider that the difficulties discussed below associated with extricating ourselves from an undeserved accreditation/registration argue in favour of our taking a more cautious approach for the time being when dealing with applications than might otherwise be the case. We might, for example, be inclined to ask for a little more information/evidence up front or carry out a few more initial site inspections under reg 22(4).

Prevention, as they say, is better than cure…..

Marcus

From: Marcus Porter
Sent: 03 November 2011 14:38
To: Ashley Malster
Cc: Faye Nicholls; Ade Obaye; Morag Drummond; Laura Missingham
Subject: RE: FURTHER AMENDMENTS ETC TO VOL 2 OF THE RHI GUIDANCE

Thanks Ashley

As to 1), I agree that 34(d) couldn't be used if we considered that person X had informed us within the time allowed for doing so under that provision.

(Incidentally that begs the question "What *is* the time allowed". No time is specified in the provision. The answer is probably an implicit "whatever time is reasonable in the circumstances", but, if so, that of course highlights an unfortunate feature of the provision – namely that views may differ as regards how long is "reasonable" – a recipe for litigation in other words).

In the absence of any other provision I guess we might have to argue that there was a breach of 34(e). I think that arguably works, but I confess that I wouldn't be very enthusiastic about relying on it as there is a respectable argument (and it may well be the better view) that (as already suggested) it only kicks in where there is initial eligibility which the participant then fails to maintain. It would certainly be unfortunate if doing so led to a resource sapping year long JR which we ultimately lost!

As to your point 2), I take your point and it may well be right. Can we really call it material if the damage is already done? I imagine that our counter argument would be that it was nevertheless proper to categorise it as "material" in view of the nature and importance of the information they failed to pass on. I.e. they not only provided us with duff information at the outset (perhaps deliberately) but they then compounded that by failing to come clean afterwards – thereby ensuring that we were kept in the dark about a matter which, though we might not be able to do anything about it, it was at the least highly desirable for us to be aware of as the scheme administrators.

Again, I wouldn't feel particularly confident of the outcome if we had to rely on an argument of that sort and I fear this is another example of a matter that needs to be addressed by amendment of the Regs at DECC's earliest convenience. As to that, I've lost track of

how many provisions there are where we feel that there is a need for early amendment, but my sense is that the case for an early set of (perhaps exclusively) "remedial" amending regs is becoming progressively stronger.
Marcus

From: Ashley Malster
Sent: 03 November 2011 13:31
To: Marcus Porter
Cc: Faye Nicholls; Ade Obaye; Morag Drummond; Laura Missingham
Subject: RE: FURTHER AMENDMENTS ETC TO VOL 2 OF THE RHI GUIDANCE

That's helpful. I think we're getting closer.
My issue is that the breach we're relying on here is one of them not informing us.
Which leads to two questions

1) What if they do inform us?

Eg in this scenario:
Person X applies for accreditation with incorrect information.
Ofgem, based on this information, decides to accredit and notifies Person X of this decision.
Within a short period of time, Person X comes back to us to inform us that some of their application information was incorrect.
If Ofgem had been aware of this earlier, we wouldn't have decided to accredit.
I assume that we couldn't use 34(d) against them if they had already notified us soon after accreditation. So what could we do then?

2) Even if they don't notify us and we find out later – so they are in breach of 34(d) - is this really material? It may be an important piece of information at the point of accreditation decision, but if we're not able to do anything about it after we've accredited, is it so material any more?

From: Marcus Porter
Sent: 03 November 2011 11:55
To: Ashley Malster
Cc: Faye Nicholls; Ade Obaye; Morag Drummond; Laura Missingham
Subject: RE: FURTHER AMENDMENTS ETC TO VOL 2 OF THE RHI GUIDANCE

Thanks Ashley
I'm a bit puzzled by your email as I have tried to provide a full reply to your questions. However I'll summarise now.
We can't revoke on the ground that an applicant supplied incorrect information in order to obtain accreditation/registration. However, depending on the exact circumstances, we may be able to revoke on the ground that the participant didn't notify us subsequently that the information was incorrect (and by not doing so contravened reg 34(d)).
Reg 34(d) appears to apply even where the participant didn't know, at the time they supplied the information, that it was incorrect.
To be able to revoke in light of a breach of 34(d) we 'd have to be satisfied the contravention was "repeated" (unlikely) or "material".
Each case would need to be considered on it's own facts to determine if the failure to tell us of the inaccuracy was "material", but if it made the difference between eligibility or no eligibility I should have thought that in the vast majority of cases we would conclude that it was indeed material.
My mention of the fraud offences was included in order to give you a complete picture rather than to provide reassurance concerning making payments, not least of course because involving the police would be a separate issue.
Marcus

From: Ashley Malster
Sent: 03 November 2011 11:29
To: Marcus Porter
Cc: Faye Nicholls; Ade Obaye; Morag Drummond; Laura Missingham
Subject: RE: FURTHER AMENDMENTS ETC TO VOL 2 OF THE RHI GUIDANCE

Marcus
Thanks
This is a long email and I'm afraid at the end of it I still end up not knowing whether we can take action against someone who was ineligible when they applied, but gave us incorrect information.
My key question is once we know that they were not eligible, can we revoke their accreditation?
The fact that we can refer them to the police doesn't reassure me if we're still required to pay them 20 years of support even though they weren't eligible.
Ashley

From: Marcus Porter
Sent: 03 November 2011 11:24
To: Ashley Malster
Cc: Faye Nicholls; Ade Obaye; Morag Drummond; Laura Missingham
Subject: RE: FURTHER AMENDMENTS ETC TO VOL 2 OF THE RHI GUIDANCE

Ashley

Thanks for this.

I'll deal separately with you query regarding 10.26. In the meantime my responses to your points on the other issue below are as follows.

First of all, I should mention that of course action under the regulations may not be the only option open to us.

Under reg 22, those applying for accreditation have to make declarations of specified kinds and will also have to provide a considerable amount of additional information.

The same is true of those applying for registration under reg 25.

In addition, applicants for accreditation have to provide what amounts to a declaration in relation to grants from public funds.

There are also ongoing obligations in relation to the supply of information, e.g. in the annual declaration.

If an applicant (or indeed participant) supplies information or makes a declaration which he know is or may be wrong, or withholds information he is under a duty to disclose, in either case dishonestly and with the intention of making a gain for himself and/or causing someone else loss (which would include payments under the RHI), that is fraudulent and he may be prosecuted and convicted for it. We rightly warn people about this in the guidance and doubtless we would notify the relevant police authority if we had en to believe that there had been fraud.

To return to the Regs, with apologies if I'm telling you what you already well know, it may assist if I quickly run through the various provisions that fall to be considered:

If we wished to revoke accreditation or revocation in circumstances of the kind described above it would be to regulation 47 that we would have to turn and to invoke that we would need to be satisfied that there had been a material or repeated failure to comply with an "ongoing obligation".

The term "ongoing obligation" is defined in reg 2 to mean the obligations specified in Part 4.

Much of Part 4 (regs 28 to 32) is concerned with ongoing obligations that apply to particular renewable heat activities and it appears that these would be unlikely to apply in the circumstances you describe.

Reg 33 relates to bio-methane producers but only to "participants" (defined to mean those who have already been accredited or registered). As it applies to participants only this doesn't help either as you are concerned with those who provide incorrect information *with a view to obtaining* accreditation or registration.

Reg 35 is concerned with metering and, again, bites only on participants.

Reg 36, yet again, applies to participants only and to information supplied by them once they have that status.

This just leaves reg 34, which lists ongoing obligations of a general nature:

Many of the provisions in reg 34, in their nature, are inapplicable.

One paragraph in that regulation that may be applicable is 34(c), given that I have questioned below the reference in para. However the obligation under that is to submit an annual declaration and a participant who provides one containing the specified confirmation complies with that obligation even if the declaration is incorrect.

That said, on reflection it appears reg 36(4) probably comes to the rescue in relation to cases where the participant knows that information in the annual declaration is or may be false or has deliberately refrained from checking the accuracy of the declaration. Though it may not assist in the event of what appears to be an honest mistake on the part of the participant.

Given that honest mistakes may not be covered, I feel that you should cater for that fact in para 10.33 by substituting "inaccuracy in" for "errors in".

The paragraph most likely to assist you in relation to information supplied with a view to obtaining accreditation/registration is 34(d), which requires participants to notify us if any information provided in support of an application for accreditation or registration is incorrect.

This is an absolute obligation on the face of it and applies whether or not they know or ought to know that it was incorrect.

Consequently, in the scenario you mention, there would be contravention of 34(d) if the "mis-information" (whether or not that was supplied in the knowledge that it was incorrect) is not reported to us and we could use this as the foundation for enforcement action which, depending on the exact circumstances, might well include revocation.

Hopefully that goes some way towards allaying your concerns. However it's important to note that the mischief at which 34(d) is aimed isn't quite the same as that referred to in 10.33 below. It addresses failure to tell us of inaccuracy in information provided previously as opposed to (as in 10.33) the actual *provision* of that incorrect information.

It follows that, for 10.33 to be correct, it would need to be amended to reflect that distinction.

You might think that we could also make use of reg 36(4) again to deal with the scenario you mention but in fact we couldn't - because, as already mentioned, 36 relates only to "participants" (cf the annual declarations point – see above).

I don't believe 34(e) helps in the scenario you mention, since it seems to be aimed at the situation where there is initial eligibility but subsequent failure to maintain that, rather than that where the eligibility requirements are not satisfied to start off with.

Similarly, I don't see reg 48(1) as being relevant, that being concerned, in my view, where there is "entitlement" to periodic payments but we have overpaid, rather than a situation such as that which you mention, where there no eligibility at all and false statements wee made to lead us to believe otherwise.

Marcus

From: Ashley Malster
Sent: 02 November 2011 10:57
To: Marcus Porter
Cc: Faye Nicholls; Ade Obaye; Morag Drummond; Laura Missingham
Subject: RE: FURTHER AMENDMENTS ETC TO VOL 2 OF THE RHI GUIDANCE

Marcus

Thanks

A few quick questions / requests:

1) On 10.26, I take your point that we may be going too far to imply that after the end of a year's suspension of payments, it would be routine to then take further enforcement action (eg permanently withholding, revoking). But I do think we need to say something here rather than imply that that's the end of the road for enforcement. **Do you think you could propose a redraft** for that bit to make clear that there are further powers that we may be able to use, but without over-presuming (in conjunction with **Ade** if necessary)

2) Your comment at 10.33 concerns me:

> 10.33 Examples of cases that might warrant revocation may include (but are not limited to): providing false or materially inaccurate information in order to obtain accreditation or registration **I don't agree with this. We can revoke only where there has been material or repeated failure to comply with an "ongoing obligation" as defined and providing false information fro the purpose of securing accreditation does not constitute an ongoing obligation**, repeated or material errors in periodic data or annual declarations **ditto re annual declarations**, repeated or material failure to maintain equipment according to manufacturer's instructions or generating heat for the predominant purpose of increasing payments. Any decision made on whether to revoke accreditation or registration will take into account information which we consider to be relevant, including the factors mentioned at paragraph 10.6 above.

Can I check: Imagine the following scenario: someone applied to us for accreditation with some incorrect information (irrespective of whether deliberate or not), which made them look eligible. We subsequently find out about the incorrect information and realise they were not eligible at the time they applied. Are you saying that we cannot revoke their accreditation then? If not that's a big problem: put misinformation on your form and we have to let you in and keep you in. And is the answer different if say they incorrectly told us they hadn't received a grant when they applied when in fact they had?

3) Looking ahead to Chapter 12… I know you haven't officially sent us that yet, but I've spotted a comment on 12.6 about you not thinking a formal review may take place more than once on a particular decision. **Can I ask you to please consult Faye** on that specific question – designing that review process was quite a complex, sensitive affair that Faye was very heavily involved in. I know she's busy on NI RHI, but hopefully she could spare a moment to answer a specific question from you (rather than say having to review the whole chapter).

Ashley

From: Marcus Porter
Sent: 01 November 2011 18:55
To: Ashley Malster; Laura Missingham
Cc: Faye Nicholls
Subject: FURTHER AMENDMENTS ETC TO VOL 2 OF THE RHI GUIDANCE

Ashley

I attach a further Sharepoint version of Vol 2 to the RHI guidance, showing with track changes my suggested amendments and, in bold, my comments, in relation to Chapters 6 and 8 to 10 and Appendices 1 and 6.

Marcus

http://sharepoint/Ops/CL/CL_Lib/ORS/Env_Programmes/Renewable%20Heat%20Incentive/Ofgem%20RHI%20guidance/Final%20Guidance/Amended%20Guidance%2020.09.11/vol%202%20again.docx